New York Surrogate's Court.

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PROPOUNDED AS THE

LAST WILL AND TESTAMENT

OF

JAMES B. TAYLOR, DECEASED.

OPINION OF ROBERT C. HUTCHINGS, Surrogate.

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1871.

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IN THE MATTER OF THE PROBATE OF A PAPER PROPOUNDED AS THE LAST WILL AND TESTAMENT OF JAMES B. TAYLOR, DECEASED.

THE SURROGATE: The paper which is propounded for probate as the last will and testament of James B. Taylor, deceased, bears date the 30th day of June, 1870, and his death occurred on the 22d day of August following. He left, surviving, a widow, and a grandchild, his only descendant, a young lady of about nineteen years of age, who is the contestant in this case. It appears that Mr. and Mrs. Taylor had been married about forty years and had lived in the most happy marital relations. It also appears from the testimony of friends, that he placed the utmost confidence in his wife's judgment, even as to business transactions, and, as he stated to a friend, she had helped to make his undoubtedly large fortune. His granddaughter Kate is the sole issue of an only daughter, Georgianna, who married, when quite young, a Mr. Vassar. This granddaughter was early bereft of her parents, and she was brought up by Mr. and Mrs. Taylor as their child, and was always known by the name of Kate Taylor. In the year 1866, she went with her mother to Europe, where she perfected her education at a school in Paris. Before their return to this country, which was in the latter part of 1868, Mr. Taylor, who had hitherto lived at hotels, purchased a fine mansion in Madison avenue in this city, and furnished it, to a large extent, with selections made by Mrs. Taylor and the grandchild, while in Europe. Soon after their return, and in the month of March, 1869, they removed to their new residence. Undoubtedly, the primary motive Mr. Taylor had, in thus changing his manner of life, was the benefit and happiness of his granddaughter, who would soon be ready to enter society.

There was nothing which he seemed unwilling to grant her, and, according to her own statement, she had unlimited credit at stores; and he never even chided her for any apparent extravagance. She was, to him, his idol and hope; loving her almost to adoration, and which he continued to do, even to the time of his death; in spite of the unexpected and clandestine marriage which she made. On the 13th of July, 1869, she secretly left the house; and her whereabouts were unknown, until Mr. Taylor received intelligence that she had arrived in New Bedford, where she had gone with a Mr. Henry H. Howland, of this city, and, in the presence of his mother, (who had previously gone thither), and some friends, was married to him on the 14th day of July, 1869. She returned to this city on the 17th, with her husband. On the evening of the 19th, she called at her grandfather's house. She went into the library, and her grandfather came down stairs, very much affected, and the first words he said to her were, "*Kate, how could you leave me?*" That interview was marked with a deep affection,

throughout, on his part, and the next day she returned, with her husband, to New Bedford. After her return from the country, she again called at her grandfather's house, and, some months after, mutual courtesies were extended between the two families, but to rather a limited degree. There is, however, no doubt that he still entertained the greatest affection towards his granddaughter, but no evidence of any such regard for her husband. In the month of May, 1870, Mrs. Taylor, young Mr. and Mrs. Howland, and Mrs. Howland, senior, went to Europe, where they travelled together for some time. It appears that there were occasional dissensions between the Howlands and Mrs. Taylor, while there, which led to a separation of the party; Mrs. Taylor going in one direction and the rest of the party in another.

It is unnecessary to review the character of the disagreements. They were admitted in evidence, under the allegation of the contestant, that she intended to show undue influence, by Mrs. Taylor on her husband's mind, to lead him to make the paper in question. Since the counsel for the contestant, finally, announced, upon the trial, his abandonment of all other grounds of opposition than alleged forgery, I attach less importance to them, except so far as the result of the differences abroad, being the separation of others of the party from Mrs. Taylor, may have incensed her husband against the Howlands. They, afterwards, however, met together in Paris, on their return home, and came by the same steamer, arriving here the 22d of August, 1870.

According to the testimony of Mrs. Howland, sen., they heard at the wharf, upon their arrival, that Mr. Taylor was ill at his house; that she and Mrs. Taylor went, in a carriage, to No. 303 Madison avenue, and the son and his wife to the Howland residence, in Thirty-second street. When the former arrived at the house in Madison avenue, Mrs. Donnelly, the housekeeper, stated that the physician would be in soon, and he had requested that no one should see Mr. Taylor, until he, the doctor, came; as it was the crisis of his disease.

According to the testimony of Mrs. Howland, senior, she, first, went into the room of Mr. Taylor, and was recognized by him; when he inquired kindly about herself, Kate, and her husband "Harry;" but was silent concerning his wife, and her name was not mentioned between them; and further, that she performed ministrations to soothe and relieve him; and afterward urged Mrs. Taylor to enter the room, which, as it appears from the witness' testimony, she did, reluctantly; and she further says, that Mrs. Taylor expressed her sorrow, to her husband, that he was so ill, but she is uncertain whether she embraced him or not; and that, afterward, Kate came in the room, and that his manner towards her, was exceedingly tender and affectionate, and that he asked, "Where is Harry? I have not seen him yet," and that Harry was standing by the window, very much affected, and Kate spoke to him, saying, "Here is Harry, Father," and Harry walked up to the bed, and Mr. Taylor took his hand and said, "Harry, I am glad to see you; I didn't see you before," and that then, he seemed to close his eyes and doze off; and that remark to Harry, according to Mrs. Howland's testimony, were the last words of Mr. Taylor. The testimony, however, of the family physician, Dr. Quackenboss, is very materially at variance with that of Mrs. Howland, for he testified that Mrs. Taylor was the first person of the party, who went into the room of the decedent, and that he took her up; that he was then partially conscious, but he recognized Mrs. Taylor, certainly; that he spoke to his wife, but that her face was close to his; that he heard, distinctly, what she said to him, but he answered her indistinctly. He, moreover, states that when Mrs. Howland arrived in the room, nothing occurred between them; that neither he spoke to her nor she to him; that he neither spoke to his granddaughter nor her husband; that he was not conscious, and was dying; that the last distinct words that Mr. Taylor spoke, were to his wife, and that was about half-past three in the afternoon; that at two o'clock, or ten minutes before or past two in the after-

noon, on arriving at the house and finding Mrs. Taylor and Mrs. Howland, the elder and younger, in the parlor, where they were awaiting his return, he went up alone and told Mr. Taylor that the steamer had arrived with the family; that he was certain of the precise time, because his attention was drawn to two o'clock as the time when Mr. Taylor had a fearful hemorrhage, and when the doctor was asked, in his examination, what Mr. Taylor said on being told of the arrival of the steamer, he testified that Mr. Taylor expressed his desire to see his wife, and said, "Are they all well?" to which witness answered, "Yes, they are all well, the steamer has arrived," and Mr. Taylor then replied, "I want to see the 'Queen,'" which, to me, he was in the habit for years of calling his wife; and, according to the doctor's testimony, it was after the interview between Mrs. Taylor and her husband, that either of the others entered the sick chamber.

This is, substantially, a correct epitome, as developed by the testimony, of the relations of the parties connected with the matter in controversy, down to the time of Mr. Taylor's decease; and the testimony of the great affection evinced towards the contestant, by her grandfather, is presented by her counsel, to shew the improbability of, or to raise a presumption against, the genuineness of the instrument offered as his will, which gives only $5,000 annually to the contestant, during her life, and vests in the widow the bulk of his large estate, absolutely; but this will be fully considered in the discussion of what I regard as the principal, and, I may say, the only real, question before me; namely, the genuineness of the paper propounded for probate.

The objections filed by contestant, to the instrument in question, are nine in number, and to the effect following:

1. That the instrument is not the last will of decedent.

2. That it was not subscribed or signed by him at the end thereof, or at all.

3. That it was not signed by him in the presence of each, or either, of the attesting witnesses.

4. That the subscription was not acknowledged to each, or either, of the attesting witnesses.

5. That he did not at the time declare the paper to be his last will and testament.

6. That the witnesses did not sign their names, at the request of the decedent.

7. That the decedent was not, at the time, of sound mind or memory, or in any respect capable of making a will.

8. That the instrument was obtained, and the execution thereof procured, by fraud, circumvention, and undue influence, practised upon decedent, by Laura S. Taylor and Albert Day, or one of them, or some other person or persons unknown to contestant.

9. That it was not freely and voluntarily executed or made, as the last will of decedent, but that the subscription and publication by him were procured by fraud and coercion exercised upon him, by Laura S. Taylor and Albert Day, or one of them, or some other person or persons unknown to contestant.

These allegations, substantially, deny that the formalities of execution, required by statute, were complied with, and allege that the decedent never signed the instrument propounded as his last will and testament; or if the same were signed by him, that its execution was procured by fraud, circumvention, coercion, or undue influence exercised by Laura S. Taylor and Albert Day, or one of them, or some other person or persons unknown to contestant.

I shall first consider the testimony on the part of the proponents.

The evidence of the subscribing witnesses is as as follows.

EDWARD WITHERELL testified:

Resides at 220 Clinton street, New York; am running branch B post-office, No. 382 Grand street; have been acquainted with Mr. Taylor for forty years—since 1831; was acquainted with him about as well as with any body; was in the habit of seeing him, sometimes once, twice, and sometimes once in two or three weeks at his office; Mr. Taylor lived with him at his house a year or two. The witness, hav-

ing been shown the will, and asked whether he had seen it before, stated that he had seen it at Mr. Taylor's office, No. 48 Pine street, and signed it at the date of it, the 30th of June. Having been asked to state when he signed it, and where, and who were present, etc., he thus testified:

A. As I have told you before, I was in the habit of going to Mr. Taylor's office, and sometimes I would have long conversations with him, sometimes short, sometimes hardly say any thing, when he was engaged. I went in there on that day, I don't know as I could fix the time exactly, the latter part of the day; I think it was the afternoon; he was busy writing in his back office. He turned round and said, "Halloo, Ned," or "Good morning, Ned," he says to me. I passed in front of the private office door. There was no one there but him. He sat writing at his desk. As I said, he says, "Halloo, Ned," or "How do you do, Ned," and I walked in. "Sit down," he says. I sat down, asked him how the folks were; something of that kind of conversation. I sat there some minutes, not many, however, I don't know how many. When he got through his writing—I don't know what he was writing, I didn't pay any attention to the paper—he put it one side, and took out a paper, and said, "Ned, I have been making my will; I would like to have you sign it." I said, "Very well." I made the remark to him that it was very sensible for a man to make a will, that had plenty of money; that a man that hadn't got any thing didn't require a will; something of that kind was said.

Q. State what he did with the paper.

A. One moment; I am going to state what he did in a moment. He was sitting down; he gets up, and steps toward the door, and beckons to some one in the outside office. I didn't particularly notice who was outside when I went in. Presently, in came Mr. Jackson. He said to Jackson, "Here, I want you to sign this, you and Ned."

Q. Wanted you to sign what?

A. This will or paper. He told me he had made his will, and he said to Jackson, "I want you to sign it as witness."

Q. By Ned, he meant you?

A. Yes; he always called me Ned. I took it for that; there was no other Ned that I saw. He sat down and signed his name to the paper, and I signed mine, and Jackson signed his'n; in doing so, I dropped a drop of ink, on there, out of the pen that I had in my hand; it shows for itself. He said, "You are a careless old bugger," laughing; I said, "Yes, I know it"—joking in that way. After we had signed it, he takes it and doubles it up, and said, "I don't want you to say any thing about it—don't talk about it," words to that effect—"keep it to yourselves;" and commenced talking about something else. Jackson commenced talking about politics; I didn't pay much attention to the conversation.

JAMES JACKSON testified: Resides at corner of Sixty-third street and First avenue; am clerk in Custom House; knew James B. Taylor since he moved in his ward; was a member of the Twentieth Assembly Republican Association, of which Mr. Taylor was President; our relations, since I made a "combination" last December, were very friendly; he seemed to be very jealous if I was out of his office a single day. The evidence of Mr. Jackson was, then, as follows:

Q. Will you look at that paper [the one propounded] and state whether you ever saw it before?

A. Yes, sir, I saw that.

Q. Where did you see it, and when?

A. 48 Pine street, the day it is dated.

Q. 48 Pine street was the office of Mr. Taylor?

A. Yes, sir.

Q. In his office you mean?

A. Yes, sir.

Q. Who was present when you saw it?

A. Stating the circumstances as near as I can ——

Q. State them in your own way.

A. I went in the office that day; there were several there, as there always was, hanging around Mr. Taylor's office; I sat down, talking to General Spinola; I had been talking with him a little while, when Mr. Taylor came to the door and beckoned

for me to come in; Ed. Witherell was there with him—the last witness. Said he. "I want you to witness my will."

Q. Said who—Mr. Taylor?

A. Mr. Taylor said, after beckoning to me; I went there, and leaned by the mantel-piece; I rather hesitated—I knew there was a good deal of money involved.

Q. No matter about that—state what he did.

A. He then sat down and signed——

Q. Signed what?

A. Signed this document.

Q. This document which is now before you?

A. Yes. sir.

Q. Was Mr. Witherell present when he signed it?

A. Yes, sir.

Q. Was there any body else present in the room besides Mr. Taylor, and yourself, and Mr. Witherell?

A. Not in the inner office.

Q. What did he say? You saw him sign it there in your presence and the presence of Mr. Witherell?

A. Yes, sir.

Q. What did he say the paper was?

A. "I want you to witness my will"—that is all he said to me with reference to that.

Q. Look at it, and see if your signature is there attached to it?

A. It is.

Q. What did you write? What is written there by you?

A. "James Jackson, corner 63d street and First avenue."

Q. Did you write that in his presence at that time?

A. I wrote it in his presence at that time.

Q. After his request?

A. Yes, sir.

Q. Did you see Mr. Witherell write his name too?

A. I did.

Q. Do you recollect any thing about the blot?

A. Yes, sir; I recollect the circumstance.

Q. Do you remember any thing being said about it?

A. Oh! yes, sir—Taylor kind o' got up, in a little flurry—any body that knows him, knows how he was himself.

Q. Did he say any thing?

A. He said, "Clumsy old fool"—something like that, to him.

Q. Did he say any thing after you witnessed this paper, and after you saw him sign his name?

A. Yes, sir.

Q. What did he say?

A. "I don't want you to say any thing about this."

Q. Do you remember who was in the outer office at that time?

A. I do not.

Q. Did you see Mr. Taylor, subsequently to the time he signed this paper?

A. Almost daily.

Q. Up to when?

A. Up to within ten days of his death.

The testimony of Witherell and Jackson, on their cross-examination, was very protracted, and did not vary, substantially, their statements on the direct examination.

It appears from the testimony of these witnesses that after the execution of the instrument, the same was left in the possession of the decedent; and the Court deeming it proper, under the circumstances, to require the examination of any other person, known to proponents to have had possession of the same, Mr. James M. Sweeny was called, and his direct testimony is as follows:

Q. What is your occupation?

A. Clerk of the Superior Court.

Q. Did you know Mr. James B. Taylor in his lifetime?

A. Yes, sir.

Q. Were you appointed by the Surrogate to make an examination of his effects and papers?

A. I was appointed Special Administrator.

Q. Do you recollect the date of your appointment?

A. I think the 22d of September.

Q. Will you have the kindness to state to the Surrogate what you did in pursuance of that appointment, in reference to an examination of Mr. Taylor's papers?

A. I proceeded to, I think, the New

York Safe Deposit Company, and examined a tin box which was said to contain the papers of the late James B. Taylor, searched the tin box thoroughly, with the assistance of Mr. Van Schaick and, I think, Mr. Tracy, but found no will; then I think the order was amended to direct me to search in the office of James B. Taylor, in Pine street. I proceeded there, and searched the safe, the papers and books in the safe; and then went and searched in the book-case; took out two books; the second book I took out, in that book I found the will.

Q. Look at this paper and see whether that is the paper you found? [The paper propounded.]

A. That is the paper, the envelope, indorsed by me.

Q. Look at the inside and see. Do you know Mr. Taylor's signature?

A. Yes, sir.

Q. That is the paper you found?

A. Yes, sir, I think it is; then we had two copies of the will made in the office, and then I took the will and deposited it with Mr. Van Schaick that evening in the Surrogate's office.

Q. (By Mr. Stoughton.) It didn't leave your possession after you discovered it until you brought it here?

A. I had my eye on it all the time, and it was in my possession.

On the cross-examination of Mr. Sweeny, other facts were elicited, and I quote such parts as I deem material, as follows:

"I took out from the top shelf (referring to the book-case) on the right-hand side, with a view to go through them all" (referring to the books). "I took out one book and in the jamb, this book, I think. I think it was one volume of Benton's 'Thirty Years in the U. S. Senate.' That book was opened, and this was inside it. It laid right in the middle of the book. In taking the book out, I did not see any paper inside. I did not see it till the book opened."

Mr. Sweeny also testified, on his cross-examination, that in the back part of the drawer of the testator's writing-table, there was found, on his investigation of papers in his office in Pine street, an unexecuted paper, in the form of a will of decedent. This unexecuted instrument is particularly referred to in the testimony of other witnesses.

After the evidence of the subscribing witnesses, and Mr. Sweeny, the special administrator, the proponents rested; and the contestant proceeded with evidence to support her allegations against the will.

Considerable testimony was offered to shew the affectionate relations existing between the decedent and his granddaughter, the contestant; not only at or about the date of the paper propounded, but, always, even up to the time of his death. These relations of affection have not been questioned by proponents; and, being conceded on both sides, they are therefore important to be considered, simply, in respect of the improbability, claimed, by the contestant, that the decedent would, or could, make a will with a provision, for her benefit, limited to $5,000 per annum, during her life; and, founding upon that, the inference of undue influence, and even of fraud or forgery. In no other aspect of the case, does it seem necessary to discuss the bearing of testimony shewing the decedent's devotion to his granddaughter. But I defer further comment upon that branch of the case, until I have presented the other testimony on the part of the contestant, claimed, by her counsel, to support that view of her interests in this controversy.

As, however, the counsel for the contestant, at an early stage of the trial, evidently, placed their strongest reliance upon the charge that the instrument in question was not genuine, and was, in fact, a forgery, and as all other questions before me are subordinate to that, I deem it, in order, now, to consider, fully, the evidence upon the genuineness of the paper. In so doing I shall have occasion to comment, not only upon the testimony of the witnesses, acquainted with the decedent's signature, but,—first,—of others sworn as experts, not so acquainted with his handwriting;—as well those for as against the genuineness;—and, incidentally, I shall also advert to

the arguments offered, on either side, on the subject of probability or improbability of a disposition, on the part of decedent, so to dispose of his estate, as the paper imports; including those founded on his acts and declarations, embracing not only oral statements, but letters, and the paper produced, unexecuted, in the form of a will, containing very different and, apparently, altogether more liberal provisions for the granddaughter, than that now offered for probate.

The testimony of the subscribing witnesses, being unqualifiedly positive as to having seen the decedent execute the paper in question, and no evidence, whatever, having been adduced or offered, on the trial, by the contestant, to impeach the credit of either of them, as of good *general reputation*, among their acquaintances, for truth and veracity, and worthiness of belief under oath,—and a *prima facie* case for admission of the instrument to probate, having been made out by proponents before they, first, rested in their testimony, —of course the *burden of proof* of non-genuineness, belonged to the contestant. Therefore, in order to prevent admission to probate,—the evidence on the part of contestant,—(none of whose witnesses testify to any visit at Mr. Taylor's office on the day of the date of the paper), must be found sufficiently preponderating, over the evidence for the proponents, as, virtually, to convict, not either alone, but, both of the subscribing witnesses, first, of the crime of being actors in the commission of a *forgery*, and, after that, of wilful and corrupt *perjury*. Does the evidence warrant that conclusion, in regard to those witnesses?

So much time was taken upon the trial, in the examination of witnesses for the contestant and proponents, as *experts*, who had no personal knowledge of decedent's handwriting,—and as I am unable to attach that value or importance to their testimony, which was ascribed to it by the contestant's counsel,—before proceeding with the evidence of the witnesses, on either side, whose opinions were founded on personal acquaintance with the handwriting and signature of decedent, (and whose evidence I prefer to discuss in another connection)—I shall first consider, at length, on the subject of genuineness of signature, the matter of the testimony of experts on handwriting.

Two witnesses of this class testified on the part of the contestant, viz.: Joseph L. Paine and Albert S. Southworth. Their testimony was very elaborate, and covers very many folios in the printed record of the evidence.

George G. Stimpson testified, on behalf of the proponents, and another witness, of this class, was offered on the same side, but under the intimation of the court that there was enough of that species of testimony, he was withdrawn.

In the views which I am about to express, of the value of this character of testimony on the part of the contestant, I desire to be understood as including that on the part of the proponent.

In forming an estimate of the weight and value to be ascribed to the testimony given by *expert* witnesses, employed for the specific purpose, a brief consideration of its claims to scientific accuracy must be premised.

It cannot be doubted that the evidence of these witnesses was based upon a minute examination of the materials submitted to them for an opinion. This is very apparent in the elaborate analysis they have submitted to the court. Every dot and tittle of the signature to the document here, propounded as the last will and testament of the decedent, was closely examined, and its characteristics compared with those signatures which both parties claim to be genuine. Not even the most minute changes and differences in the conformation of different letters, or the relations of the various parts to each other, or the peculiar characteristics of the whole, escaped their searching observation. The appliances of photography, by which the minute parts could be magnified, and their appearance, when so enlarged, preserved, were resorted to, by one of the experts on the part of the contestant; though the photographs were not admitted by the court in evidence. No means were left untried, by which the differences between the signature to the propounded will, and

the five signatures in the case, as exhibits, could be magnified, and their importance dwelt upon.

The experts examined the curves and angularities of the strokes of the letters, the directions of the slope of the various parts, the amount of pressure exercised upon the down strokes, the point at which it was initiated, and the place it ceased; the apparent rapidity with which the pen was carried to make the up or hair strokes, their regularity or irregularity, the size of the loops, the relative size of the different letters, and the comparative length of the different signatures. All that ingenuity could invent, was resorted to, and the difference between the various signatures was presented, in a manner that shows the great study devoted to the elucidation of the subject.

It is the practice of the courts, when it is necessary for their aid, to receive the evidence of men skilled in the various arts and sources of knowledge as experts, to elucidate the general principles, or practical data, upon which their science or art is based. In this manner, chemists, civil engineers, physicians, or the representatives of any vocation or calling, may be brought to the witness' stand to testify in regard to the facts of their various professions. The chemist, in his particular business, may be asked to state the manner adopted, in which poisons can be detected in food or eliminated from the human body. Again, his opinion may be desired upon the sufficiency of certain procedures to attain certain results. In either case, it is necessary to remember that he is guided by common universal laws, known to every chemist, and that his testimony relates to their application. In this manner, it is occasionally necessary for a court to require information from a civil engineer. It is the province of this profession to take cognizance of the effects of the elements upon materials used in constructing works; to know the effect of the tides and of running waters; to be able to estimate the durability and safety of structures erected in a particular manner, etc. But the value and weight of this kind of testimony are best exemplified in the evidence of physicians, skilled in mental diseases, in cases where the question of responsibility is involved. In these cases an expert can furnish information, attainable in no other manner. The causes and progress of the disease, its development and modes of expression, together with the manner of determining its presence, can alone be furnished by those individuals whose profession it is to study and understand the diverse methods in which diseases of the mind and brain can be manifested. For purposes of illustration, we will briefly contrast the basis of facts which underlie the testimony of experts in handwriting, and experts in mental diseases, and then consider what may be the sources of fallacy, which, if they do not entirely vitiate, yet render the former less reliable than the latter.

The facts which the medical expert is called upon to elucidate are those parts of the common knowledge of his profession which relate to, or have a bearing on, mental disease. Those general principles which enable him, as a physician, to form a judgment upon particular cases, are explained to the court, and, it may be, that his professional opinion is solicited, as to the bearing and significance of certain matters in evidence. In all cases, it must be borne in mind, the expert merely reflects the light of his own calling, upon matters which properly come within it. He refers to a series of analogous cases, and he supports himself by the opinions of the recognized standard authors on mental diseases. His opinion is valuable according to his experience and position. And his opinion is, moreover, supported by the analogy of cases and the agreement of the standard writers on the diseases of mind,—that certain acts, characteristics, and appearances of a man, whose sanity is disputed, is evidence of a certain disease.

How different is the case in any attempt to found a scientific basis for a system of expert evidence in handwriting, will now be evident.

In the testimony of the witnesses called as experts, both on the part of the proponents and contestant, we have an illustration of the manner in which care-

ful and painstaking study, will discover alterations and differences, imperceptible to the ordinary observer. These differences have been magnified, dwelt upon, and finally collated and submitted, as proof of the non-genuineness of the signature "James B. Taylor" to the propounded will, and it may be well for this Court to speak fully and decisively, as to the value it is disposed to ascribe to such evidence.

First—This evidence merely traces alterations and differences between the signature to the will and the five other signatures introduced as evidence; no attention being paid to the analogies between the former and the latter; nor to the differences between any two of the five, and none to the attending circumstances and conditions under which they were executed.

Second—These distinctions were, to a certain extent, drawn from the study of photographic copies of the signature of the will. This the evidence shews, though the Court excluded on the trial the use of the photographs.

Without enlarging on the fact that a simple mark becomes a legal and valid signature, when properly witnessed, we will look for a moment at those ordinary every-day occurrences which produce, among the daily signatures of any or all of us, alterations as great, or greater than were discovered between the signature to the propounded will, on the one hand, and certain of the exhibits on the other. Where this has been done, it will be seen that no evidence, of the nature here presented, is entitled to any weight, unless supported by strong corroborative proof.

In the first place, it appears to me, that the mental condition of an individual must necessarily have an important influence upon the character of his writing. Instances of this nature are so common as to scarcely need illustration. Imagine a man overwhelmed with grief, or furious with anger, or under the effect of stimulants, attempting to write his name!

The momentary vexations of life are sufficient to produce appreciable alterations, while even such commonplace occurrences as the pressure of business or the state of the weather, are not without influence. Taking, for example, the theory of the contestant, (though not at this time passing on the fact), that the signature to the will, is written with more steadiness and regularity than the five signatures which are in evidence as exhibits in the case (one is an indorsement on a promissory note, and the other four to letters to his granddaughter when in Europe),—may not this be considered as an evidence of the effect of mental condition upon handwriting? Is it improbable that a man of Mr. Taylor's years, who, so far as it appears from any evidence, had never before affixed his signature to so solemn a document as a will,—an act which brought vividly before him, as it brings to all men, the certainty of death, and that death is necessary to ratify the decrees therein expressed,—should write that signature with more deliberation than the many signatures, which he was in the habit of hastily and, automatically, affixing to checks, notes, letters, bills, etc.?

Of equal importance, are the physical circumstances surrounding an individual: the height of the table at which he sits, the differences between sitting and standing, when he has to write in a posture to which he is unaccustomed, the flexibility and peculiar character of the pen or quill, the kind of ink, and the substance supporting the paper. A trial will speedily convince any one, of the radical differences perceptible between two successive signatures, when the only circumstance, altered, has been to write one on marble and the other on cloth: or in the kind of paper—those accustomed to ruled paper may write badly on unruled, and the same thing may be said, as to the peculiar quality of the paper, whether sized or unsized, the degree of light in the room, etc.

The circumstances affecting handwriting are almost numberless. The state of bodily health is another point. A natural condition of the parts of the body, used in writing, is of prime importance. A trifling blow on the arm, the effects of a slight fall, a rheumatic or neuralgic pang, or a gouty twinge may either completely

annul or greatly modify the power and facility of writing.

Any one of these circumstances may completely vitiate all the learned disquisitions of these experts, on what should be the exact uniformity of hair-strokes, base lines, loops, and slopes.

A moment's reflection will shew how competent any one of the above circumstances may be to produce alterations in the handwriting, which can be rendered apparent by a rapid scrutiny, such as was bestowed upon Mr. Taylor's signature; and in this connection I may observe that, according to the testimony of one of the witnesses, Mr. Taylor suffered, in his shoulder and hands, from a rheumatic ailment; a fact not known to the experts examined.

The fact that such differences were discovered by these experts, will lose any significance, when it is considered that the process they employed, will produce like results, when applied to several copies of almost any signature, provided they were made at different times and under different circumstances.

Are these witnesses who call themselves experts, properly entitled to the appellation? They claim to have made the question of handwriting a specialty and profession, and it is contended that they are as properly experts as those in chemistry and diseases of the mind. In considering whether this is true we must reflect that it is not the mere profession and assumption of special knowledge, it matters not how such professions and assumptions are put forward, which entitle any individual to be considered an authority upon any point. The chemist who searches the viscera of a human being who has died with the symptoms of poisoning, looks for a substance which all chemists agree is detrimental to the human body and acts in a certain manner. In his mode of procedure he is sustained by all of his profession, any one of whom knows the value and importance of each of his steps. In other words, all his steps are guided by general laws, the common property of all chemists.

When his investigations have been pursued to successful termination and he has found the poisonous substance, he can demonstrate not only the steps of his progress, but the ingredients of the substance he has found. The expert in diseases of the mind does not pretend to testify as to the mental condition of an individual unless he has made a personal examination, or in the absence of that, he bases his opinions upon the whole evidence in the case; the language, acts, and physical appearance of the person whose sanity is to be decided. What does the expert in handwriting profess to do? He has no scientific basis of education, experience, or laws to build on. As in this case, he simply compares one signature with five others, and notes some differences, the *causes* of which he does not attempt to explain, and which, from his point of view, are entirely unimportant in arriving at the conclusion that the same hand which wrote the signature to the will did not write the other five signatures. He is entirely ignorant how, when, and where those signatures were written; the mental, nervous, or physical condition of the writer; or of any of the influences which practical common sense teaches have an effect on handwriting.

The mental and material influences are unknown to him. In fine, the writer was to him a stranger.

Again; it appears by the evidence of one of the experts, in reply to a question from the court, that the signature to the will is written on a blue-ruled line, while in the cases of four of the exhibits, the signatures are written on unruled paper.

How is it possible for them to tell the influence upon a man, with whom they were unacquainted, who was obliged to write his signature on a ruled line, when he may have been accustomed to write on unruled paper, as to its effect upon either rapidity or steadiness of motion? This is one of the many little but important material circumstances which concur to affect handwriting, and which may be, in itself, sufficient to destroy all the theories of experts.

Moreover, after a careful consideration of the evidence of these experts covering several hundred folios, it appears to me

that the tendency of their system is so entirely analytical as to weaken, if not to lose, the power of generalization.

While successful in pointing out the most minute differences and variations between certain letters and their lines and strokes, they completely fail to take that comprehensive view of any of the signatures in question, which is so apparent to a practical man. It seems to me that the intuitive generalization made by any one of the witnesses speaking from personal knowledge of the handwriting of Mr. Taylor, either on the part of the proponent or contestant, is of more valuable assistance in the investigation as to the genuineness of the signature to the document here propounded, than either of the two experts called for the contestant, or of the expert called on the part of the proponent.

One of the experts called by the contestant, Albert S. Southworth, stated that his business was the examination of disputed handwriting; and that his business had been also photography, and that he used that art in his examinations.

This witness was asked to look at an exhibit which was marked for "identification," and to say whether the name "James B. Taylor" was a correct photographic copy of the signature of the alleged will. The answer to this question was excluded by the Court for the following reasons, as expressed on the trial:

"The *original* signature to the alleged will has been presented to the witness, and he has examined it and compared it with the exhibits properly in evidence. That is the best evidence to be had, and he can speak from that. I shall exclude all testimony drawn from photographs, as being inadmissible, upon the question of handwriting. Such evidence would raise many collateral issues, as, for instance, the correctness of the lens, the skill of the operator, the color of the impression, and other issues, which I think clearly require me to exclude such photographic evidence upon this question of genuineness of signature. It is, at best, secondary evidence."

I shall consider the value of testimony based on photographic copies hereafter, in the consideration of the testimony of those witnesses, on the part of the contestant, whose opinions, given on the trial, were assisted, even if not positively formed, by photographic copies of different specimens of decedent's handwriting, including signatures of different sizes.

Thirteen witnesses, for contestant, who testified that they were acquainted with the signature of the decedent, stated that in their opinion the signature to the propounded will was not in the handwriting of James B. Taylor.

Their testimony was substantially as follows:

ABRAHAM VAN VECHTEN testified that he resided in Albany, been acquainted with the decedent for the last twenty years, and have known him intimately for the last ten or twelve years; in the habit of seeing him often, having frequent business transactions with him. He had seen him write frequently, and in reply to a question whether the signature to the will was in Mr. Taylor's handwriting, stated that it was not in his handwriting, and that there are certain peculiarities to Mr. Taylor's signature which are wanting to the signature to the will. On *cross-examination*, Mr. Van Vechten admitted that when he first saw the will in the Surrogate's office he may have stated that it was a genuine signature, and that his opinion has changed from a critical examination of the signatures of Mr. Taylor, which have certain peculiarities about them that are wanting in the signature; but that previous to the examination of a large number of signatures in his possession, his attention had been called to it by the examination of a photographic copy. He also stated that the general appearance of the signature to the will was better than Mr. Taylor's ordinary signatures and written with more care, and the letters more perfectly formed than his usual signature; also, that he had a letter from Mr. Clinton, requesting him when in the city to call in his office; that he went there; that Mr. Clinton showed him what purported to be a photographic copy of the signature to the will; that he made a

critical examination of that copy, and compared it with genuine signatures which Mr. Clinton had in his possession; that when he returned to Albany he made up his mind from an examination of the photographic copy and the copies which Mr. Clinton had on the subject. He then returned to Albany and compared it with the signatures he had in his possession. He (Mr. Clinton) had photographic copies of three or four signatures, and other signatures which were not photographs. He compared what he supposed to be photographic copies of genuine signatures with the photographic copy of the signature to the will. After that examination, when he examined genuine signatures of Mr. Taylor, he found that there were certain invariable peculiarities in them all, which were wanting in this signature, that induced him to swear that this was not a genuine signature.

Mr. LUTHER R. MARSH, a well known member of the bar of this city, testified that he had known Mr. Taylor for about fifteen years intimately, and that he had been his counsel in many of his impor ant cases. "The signature does not seem to me to be a genuine signature of James B. Taylor. That is my best belief on looking at it. I have looked at it a good deal from the photograph, which seems to be, according to my recollection, a copy of this, as a matter of curiosity, not expecting, certainly, to be a witness; expecting, on the contrary, very certainly that I would not be a witness, but have examined it more, perhaps, than I did any other signature, for the purpose of making up my mind whether it was a genuine signature or not." On cross-examination, Mr. Marsh testified that he saw the photograph some time after—looked at the signature on the will in the Surrogate's office, where he at least stated that "the signature looked like Mr. Taylor's handwriting."

WILLIAM C. BARRETT, also a well-known member of the bar of this city, testified that he has been acquainted intimately with Mr. Taylor for the last twenty-eight to thirty years, and that he was familiar with his signature, having received it in the way of business. He testified that there is a similarity, but that he does not think it is James B. Taylor's handwriting. "That signature, in my judgment, was never written with that dispatch with which I knew Mr. Taylor was in the habit of writing his signature. And I would further say that Mr. Taylor's signature was never uniform."

He testified, on cross-examination, that the counsel for the contestant submitted to him a photograph of the signature; he looked at it—he looked at some other signatures, and became satisfied it was not Mr. Taylor's signature. He also stated that his judgment was made up before he was subpœnaed as a witness from the photograph, though he had examined the will, before being examined.

CHARLES L. FROST, of No. 53 Wall street, who is Presi lent of the Albany and Brunswick Railroad of Georgia, of which Mr. Taylor was one of the directors, testified that he had intimate business relations with Mr. Taylor, and had seen him write his signature thirty or forty times, and had many signatures of the decedent in his possession. He testified that the signature to the will was not in the handwriting of Mr. Taylor. On cross-examination, he testified that the counsel for the contestant brought him a photograph and asked him if he had Mr. Taylor's signature, which he had; that he made up his judgment from the photograph first, if that was correct, before he was examined, from the will.

Mr. JOSIAH P. FITCH, a lawyer of this city, testified that he knew Mr. Taylor from 1860 to within two years of his death, and that during that time he was more or less intimate with him, having business relations; that he had received letters from him, and had seen him write frequently; that he had received at least one hundred letters from him, though not within the last two years. In his opinion, the signature to the alleged will was not in the handwriting of Mr. Taylor. On *cross-examination*, he testified that the counsel for the contestant had showed him some photographs of Mr. Taylor's signature, which he stated were genuine, and also what he

said was a photograph of the signature to the will; and that he made up his mind, if that was a correct photograph, he did not think the signature was genuine; and that he made up his mind by comparing his general recollection with the photograph of the will; though, afterwards, the day before he was examined, he examined the signature to the will in the Surrogate's office, and compared it with the photograph of the other signatures. He further stated that, although he was not ready to swear that it was not Mr. Taylor's signature, yet in his opinion it was not.

HENRY W. JOHNSON, a lawyer in this city of sixteen years' standing, testified that he was intimate with Mr. Taylor the last ten years of his life; that he had frequently seen him write, and received papers from him for a period embracing nearly four years, commencing in January 1860. On being shown the signature to the will, he stated that he did not think that it was in Mr. Taylor's handwriting, or written by him. On cross-examination, he stated that the counsel for the contestant called at his office and showed him what purported to be a photograph of the signature of the will. He then compared it with some signatures which the counsel had with him, and with one or two which he had in his possession, and that he made up his mind in reference to the genuineness of this signature from that comparison, and that he had not seen the signature to the will until it was shown to him in court; that he made up his mind from a comparison of the photograph which the counsel had with him and those he had; that he found a resemblance, but the more he examined it the more he was led to the conclusion that it was not a genuine signature—the more he found the signatures different—and that he made up his mind that it was lacking in the characteristics of Mr. Taylor's signature; that there is a smoothness and regularity in the signature which is not characteristic of what he regarded as his genuine signature.

ROBERT GILLEN, a lawyer of this city, testified that he had been acquainted with Mr. Taylor's signature for seven years previous to his death; that he had had business transactions with him; that he had seen him write and had received his signature within a year before his death, and that he was acquainted with his signature; that he had received his signature not more than six times within five years, and that he had been in his office and had seen him write half a dozen times at least. He testified that he could not swear that the signature to the alleged will was his handwriting: that it did not look to him like his handwriting, and that he did not think it was.

CHARLES COOPER, a resident of Brooklyn, but engaged in business in this city, testified that he became acquainted with Mr. Taylor in 1833, and was secretary of a silver mining company called the "Roman Brothers Company," of which Mr. Taylor was President. He testified as his opinion that he was very confident that the signature was never made by James B. Taylor. On cross-examination he said he made up his mind with regard to it not being the signature of Mr. Taylor from his knowledge of his handwriting and the general characteristics of his signature. He made up his mind because, after a very careful examination of the signature, comparing it with a great many signatures he had in his possession, and studied the question. He took a good part of one day, and made a very careful examination to satisfy his own mind, and came to the conclusion that the photographic signature which he had, lacked the characteristics of Mr. Taylor's handwriting, or, in other words, that he failed to discover in the signature to the will what he regarded as the characteristics of Mr. Taylor's signature.

BENJAMIN F. MUDGETT testified that he was a lawyer of this city, and practised in this city; had lived here about fifteen years; had known Mr. Taylor intimately for the past seven or eight years; had seen Mr. Taylor write during that time; did not know that he had received any letters from him, but had had a good many documents signed by him; have seen him sign them, and received them with his signature; had seen him write

a great many times, should say a hundred or two hundred; had seen him write when he attempted to write slow and tried to write well; if he wrote slowly his writing would be worse than if he wrote fast; his style of writing was to write a nervous, quick, prompt hand—then he wrote well. On being shown the will, and asked whether the signa ure was in the handwriting of Mr. Taylor, he replied, "I should say it was not; I don't think Mr. Taylor could write that signature. It is written too closely and carefully for his usual signature; the exactness and precision are such as I never knew him to use in his writing, and I don't think he could write in that manner." On cross-examination, Mr. Mudgett testified that he saw it on the Saturday previous; had seen the photograph; his first attention was called to the matter by finding a note in his office from Mr. Clinton asking him to call on him; he called on Mr. Clinton; he examined the photograph of the signature, and several other signatures of Mr. Taylor that he had there; he made up his mind from the looks of the signatures; he felt so familiar with Mr. Taylor's manner of writing that from the photograph he said at once he didn't think it could be Mr. Taylor's signature; that if it was a true copy of the signature on the will it was not Mr. Taylor's signature, from general recollection and familiarity.

Isaac E. Tate, a real estate broker, testified that he had been acquainted with Mr. Taylor since 1848 or 1849; that he had been in the habit of seeing him very frequently before his death during the last ten or fifteen years, though not much for the last six months of his life; that Mr. Taylor had done a great many favors for him in the way of going surety for him and his friends in business; that he had had been in the habit of seeing him write at his office about half a dozen times a year; that he had received letters, but merely orders at his store, and that he had had his notes and checks; that he thought he was familiar with his handwriting. On being asked to look at the signature to the alleged will, and say whether it was in the handwriting of Mr. Taylor, he testified he could not swear positively to that; that he had not seen him write so correct as that, if that was his signature; it was more twitching and more nervous; that might be more like his signature twenty years ago; more carefully; that he could not swear positively that that was his signature or not; it seems more correct than his signature had been for years past. In reply to a question whether he had never seen his signature like that, he testified that he had seen it, but some years ago; it might be like that some years ago; but this seems more correct than he was in the habit of writing, perhaps the last five years.

Royal S. Crane, a practising lawyer in this city for twelve years, testified that he became acquainted with Mr. Taylor about 1861 or 1862; that he had done professional business for him, in all about eight cases; that he had received his signature in the way of business on papers and letters, and that he was familiar with his handwriting. On being shown the alleged will he testified that in his opinion it was not the genuine signature of James B. Taylor. On cross-examination he testified that he had a pretty decided opinion that it was not in Mr. Taylor's handwriting, though it does look like it in some particulars; it looks slightly like his handwriting, and that from the time he examined it (which was before his examination in court) he had no doubt of it; that there are one or two letters that look like it, but only one or two in the signature.

John M. Crane, cashier of the Shoe and Leather Bank, testified that he had been connected with that bank for about fifteen years, and that he had known Mr. Taylor for ten years; that during that time he kept an account with the Shoe and Leather Bank, and up to the time of his death, and that he had, as teller and cashier, paid many of his checks and was familiar with his signature. On being shown the signature to the will, and asked whether it was his signature, he testified that, in his opinion, the signature "James B. Taylor" was

not in the handwriting of Mr. Taylor. On *cross examination*, he testified that his checks were usually signed "J. B. Taylor," and that he had seen the full name, "James B. Taylor," written, but not to checks; that he had examined the signature to the will about ten days previously; that he partially judged of the signature by a comparison in his mind between this and the signatures he had seen upon the checks he had paid; that he could hardly say there was a general resemblance, though there was something of a resemblance; that, as a general criticism, he should say that the signature to the alleged will is a more precise and studied signature, and written with more care; that he had not paid one of Mr. Taylor's checks for about five years, though he had seen him sign his name in the bank about three years ago, though he could not say that he wrote his name in full, and that he does not recollect to what it was written; that he had been cashier of the bank for nearly five years; and that it was no part of his duty to pay his checks; that his checks generally had his name printed on the margin. In reply to the question, "He was not always particular in writing his name alike at different times, was he?" he replied, "There was considerable difference in his signatures;" and whether "there was a pretty wide difference?" that "there was, to the general appearance." On the *redirect*, the witness testified, that he had looked at notes of "James B. Taylor," and in reply to the question, "You were asked, on the other side, whether there was not a wide difference between many of the signatures; I will ask you whether there was not a wide difference between many of the signatures; I will ask you whether or not all the signatures of Mr. Taylor you ever saw have the same or some leading characteristics, in your opinion?" he replied, "My opinion is that they have." "But they differ in detail, do they not?" "Yes, sir." "Won't it make a considerable difference in the appearance, according to the pen, the paper, and ink, and whether a man is more nervous than usual?" "Yes, sir"

On *cross-examination*, he testified that a photograph had been brought to him at the bank by the counsel for the contestant; that there was one of the same size as the will signature, but there were others which were magnified; there were in all about half a dozen of these photographs, of the same signature, "James B. Taylor," of different sizes, also photographs of different signatures; that with these he compared signatures at the bank, and at Mr. Clinton's office; that he noticed differences, and that this latter examination at Mr. Clinton's office confirmed his previous opinion; he did not know whether these different photographs, purporting to have been taken from different signatures of James B. Taylor, were taken from genuine signatures or not.

THEODORE ROGERS testified that he was paying-teller of the Shoe and Leather Bank, and had occupied that position for two years; that he had been during that time in the habit of seeing his signatures and his checks, which he had paid, and had seen it in the way of business for six years; that he had seen the signature "James B. Taylor," signed to promissory notes, and "J. B. Taylor" to checks: that he supposed he may have seen the full signature "James B. Taylor" about twenty-five times in two years.

On being handed the will, and asked to state whether the signature was in the handwriting of Mr. Taylor, he testified that he did not think the signature was in his handwriting. On *cross-examination* he testified that he had never seen the signature to the will, except as photographed, before to-day; had looked at the signature to the will about fifteen seconds to-day before giving an opinion; had looked at the photograph a number of times; formed an opinion certainly, by comparison, by looking at it, only by comparison if it corresponded with the one on the will.

This is substantially the testimony of the witnesses, on the part of the contestant, who were acquainted, more or less, with the signature of the decedent. Thirteen witnesses, who claimed to have

knowledge of the decedent's handwriting were then examined by the proponent. Their testimony is in substance as follows:

ANDREW V STOUT, called for the proponent, testified that he was president of the Shoe and Leather Bank, and had been so for fifteen years; that he knew Mr. Taylor, and had been in the habit of seeing him frequently, and that he had kept an account in his bank for ten years; that he had often seen him write his name, and seen his signature as attached to paper, checks and notes, and that he thought he was familiar with his handwriting. On being shown the will, he testified that, in his opinion, the signature to the will was in the handwriting of Mr. Taylor.

GEORGE JONES testified that he was the publisher of the New York Times, and had been connected with that paper since its commencement; that he made the acquaintance of Mr. Taylor in 1860, and that he was a stockholder in that paper to the amount of ten shares; that he knew him quite intimately, and that Mr. Taylor had been in the habit of coming in to see him frequently, and that he had been in the habit of seeing him write frequently, and that he had a great many signatures of Mr. Taylor in his possession - probably hundreds. On being shown the will, and asked whether the signature was in the handwriting of Mr. Taylor, he testified that he should think it was, and that he had no doubt of it. On *cross-examination*, being asked whether he thought he was a sufficient judge of the handwriting of persons he had seen write a good many times to satisfy his own judgment, he replied in the affirmative, though he did not profess to have any particular skill in his opinion above the average of people in that respect; that he had been in the habit of seeing Mr. Taylor write within the last ten years at the *Times* office; that he was in the habit of bringing in a check every day or two to get the money on it, and he used to fill them up in the office; he used to take a check out of his pocket and say he wanted the money; they were on the Shoe and Leather Bank.

JONAS P. LEVY testified that he had known the decedent for the last twenty-five years, during which time he had been intimately acquainted with him and his family; that he previously followed the sea up to 1853; had been a merchant in the ship chandlery line, and also in the real estate business; that he was familiar with his handwriting and signature, and had often seen him write. On being shown the will, he testified that he should take that to be Mr. Taylor's signature, and that he had no doubt of it. On cross-examination, he stated that he first saw Mr. Taylor at the Carlton House; that he had seen Mr. Taylor's signature alone last May or June of the past year two or three times, to letters; that he saw him write them on his desk in his office in Pine street; that he was sitting alongside of him; that he remembers having seen him write frequently within twenty years before that at my room and at his rooms; that they boarded in the same house together, over the old Tabernacle, at Mrs. Brown's, No. 481 Broadway; that he saw him write frequently at his store in Water street, when it was the firm of Taylor & Post; that he had written his signatures several times for him for recommendations for a company he was getting up. He saw the signatures on the Saturday previously to his examination in court at the request of Mr. Andrews; one of the officers of the court showed him the will, and that he looked at it for some minutes; that he came here at the request of Mrs. Taylor, the "Queen," which was the name he had known her by for the last twenty-five years.

Mr. ROBERT MURRAY, formerly and for eight years U. S. Marshal for this district, testified that he had been acquainted with Mr. Taylor since 1834; that Mr. Taylor was at that time a clerk in a dry goods store in Grand street, at the junction of East Broadway; that he boarded at that time with Mrs. Witherell, the mother of Mr. Ed. Witherell, one of the subscribing witnesses to this will. He traces his intimacy with Mr. Taylor during his different residences at the North American Hotel, corner of Bayard and Bowery, in Mott street, in East Broad-

way, in the Carlton House, the Bond street House, Union place Hotel, and Madison avenue; that he had an intimate acquaintance with him; that while he resided in the Seventh Ward he saw him pretty much every evening, and that during the last ten or fifteen years had been in the habit of seeing him two or three times a week; that he had been also very intimate with his family; that he saw him both at his residence and office, and that Mr. Taylor became his bondsman after his confirmation as United States Marshal; that he was acqnainted with his handwriting. On being shown the will and asked whether the signature was or was not in the handwriting of Mr. Taylor, he testified that he had no doubt of it. On cross-examination, on being asked whether he remembered having received his check in the way of business at all within the last ten or fifteen years, he testified that he never had any money transactions with him; that a great deal of money had passed between them for political purposes; that Mr. Taylor had not received his checks to as great an extent as Mr. Taylor had received his; that he had not received more than a dozen of Mr. Taylor's checks during the past five years, and that he had not received any promissory notes signed by him; though he had frequently received letter from him when he was Marshal, asking him to call at his office or hotel; those letters were signed "Jas. B. Taylor" generally, although he signed them "J. B. Taylor," and so far as his memory served him, some of them "James B. Taylor."

JOHN BOARDMAN testified that he lived at No. 212 West Thirty-ninth street; that he had resided in this city all his life ime, and that he had been acquainted with Mr. Taylor about twenty-five years; that he had frequently exchanged promissory notes with Mr. Taylor, and that he had no other business transactions with him; that he had frequently seen him write, and was familiar with his handwriting particularly his signature. On being asked to look at the signature to the will, and whether it was in his opinion in the handwriting of Mr. Taylor, he answered, "Certainly." On cross-examination he testified that he was not in business at present, but had kept the Mansion Stable, corner of Broadway and Forty second street, and had been also in the mineral water business; that he had been acquainted with Mr. Taylor for about twenty-five years; that he commenced to exchange notes with him in 1854, and continued up to 1860, but about the time the war commenced his transactions in that respect terminated, and he had only a little since, a very few, between 1860 and 1864, not more than one or two between those years; that for five years prior to 1859 there must have been a hundred of those transactions; that the body mostly of the notes were written by him as well as the signatures. In reply to a question whether he knew the handwriting of Mr. Taylor other than his signature, he replied that Mr. Taylor would sometimes vary in his handwriting, according to his temperament, and that his signature would also vary, as every person's does; that during the last ten years he had not received his signature other than the one or two transactions and one letter, but that he had seen his signatures two or three times, which had been shown him, except Mr. Taylor indorsed a note for him a couple of times about 1864; he never saw the will until this moment.

WILLIAM L. SHARDLOW testified that he had resided in New York all his lifetime, and that he had known Mr. Taylor from twenty to thirty, probably thirty-five years; that when he first became acquainted with Mr. Taylor he was a clerk in a store in Grand street; that he had been intimate with Mr. Taylor for twelve to fifteen years; his early acquaintance with him was very slight, casually meeting him politically during the past twelve to fifteen years; been very intimate with him, in the habit of meeting him almost every day, though during the last two or three years he had been out of town a great deal, in Florida in winter and Vermont in summer; but been in the habit of calling upon him when in town, and been in the habit of being in Mr. Taylor's office every few days; he frequently saw

him at his house; acquainted with his family, and had known his wife and granddaughter about fifteen years; had frequently during his acquaintance with Mr. Taylor seen him write and write his name; had frequently seen him write his name during the last two years; tolerably familiar with his handwriting, especially with his name; had seen him write checks more than any thing else. On being shown the signature to the will and asked whether it was, in his judgment, Mr. Taylor's handwriting, he testified that he thought it was Mr. Taylor's signature, and that he had no doubt of it. On cross-examination he testified that he had frequently received letters from him and had seen him write frequently other than his name; that he had considerable of his writing first to last to about the certainty of a hundred times; during the last ten years have received two or three letters from him—within the last ten years; am not as well acquainted with his general handwriting as his signature; have no doubt that during the years 1865, 1866, and 1867 have received Mr. Taylor's checks; have no doubt that for five years prior to that time received several of Mr. Taylor's checks; between the years 1860 and 1870 did receive promissory notes signed by Mr. Taylor and cashed them; they were notes given to me by Mr. Taylor for money advanced; recollect some $5,000 in amount; think the $5,000 note was signed by Mr. Taylor payable to some one else's order; have seen Mr Taylor writing frequently "J. B. Taylor;" have that in my possession on checks and notes; also "James B. Taylor" on checks of Mr. Taylor on Shoe and Leather Bank; have seen him write frequently James B. Taylor on his checks on Shoe and Leather Bank; was last in the stage business, running a line of stages from Grand Street Ferry to the Jersey City Ferry—the "Telegraph line;" was in that business ten, twelve, fifteen years; was engaged in the banking and exchange business in the Bowery and in Wall street; became acquainted with Mr. Taylor when he was a clerk in Grand street; knew him previous to that in the Whig General Committee, 1846, 1847, and 1848; outside of the note transactions had other business with him; he and his wife conveyed to me property in Bushwick; was a stockholder and director in the Roman Brothers Silver Mining Company; purchased his stock from Mr. Taylor; had business with him within a year; Mr. Taylor and he gave a lease of Bushwick property to George H. Duryea.

HENRY S. WELLS testified that he lived at the Fifth Avenue Hotel, and has been for the last fifteen or twenty years engaged in the construction of public works in this State, Pennsylvania, Canada, in the South—engaged as a contractor in building portions of the New York and Erie Railroad, Great Western Railroad, Delaware, Lackawanna, and Western Railroad in Pennsylvania, and a railroad in Georgia, the entire Brooklyn Water Works, and other enterprises; his acquaintance commenced with Mr. Taylor in 1856, and continued up to the time of his death; had large and intimate b siness transactions with him, he advancing large amounts of money in my transactions and indorsing my paper; the last business transaction bears date on the 28th of July, the date of the papers. I was with him when he died. We were several days consummating the thing; after that, in the exchange of securities that he held of mine; have frequently seen him write during our business; it was done in writing principally; am acquainted with his handwriting; saw him write a number of times a month; at the time of his death held his paper and notes to a large amount. On being shown the will, he testified that he had seen it once before in the Surrogate's office, where he went to look at the signature; he testified that he had no doubt of it being James B. Taylor's signature, written by himself. On cross-examination, Mr. Wells testified that Mr. Taylor was not connected with the Georgia Railroad, except in loaning money on various accounts, though in 1856 he was a director in the Nassau Water Works of Brooklyn; have seen Mr. Taylor write frequently and have had many letters from him; have

often seen him write his name; he wrote different at different times; he wrote ordinarily rather slow; almost every time I have seen him write his name he used to write it slow. In reply to a question, "Was he somewhat nervous or the reverse?" he replied, "When he put his hand down to start to write there was a nervousness about it apparently, which caused him to make little hair-marks in the "J," but just as quick as he began to put his pen down to make the letters, he wrote with deliberation, and slow. I don't recollect that I ever saw him write fast in signing his name."

RICHARD MOTT testified that he has resided in the city since 1830; that he became familiar with Mr. Taylor after 1841; that he was four or five years his attorney and counsel; that during his acquaintance he saw him write frequently; that he has several specimens of his handwriting in his possession. On being shown the will, he testified that he should think it was James B. Taylor's, and he had no doubt of it.

HENRY G. M. MATTISON, residing in New York, testified that he was Secretary of the Brunswick and Albany Railroad of Georgia, of which Mr. Taylor had been a director; had often seen him write his name, and am as familiar with his handwriting as a man can be with another that he sees write often. On being showed the will, and asked whether it was, in his opinion, in the handwriting of Mr. Taylor, he stated that he should think it was his signature. On cross-examination, he was in doubt whether a letter (Exhibit E, December 16, 1870)—was in Mr. Taylor's handwriting or not.

WILLIAM L. AVERY testified that he lived at the Metropolitan Hotel, in this city; that he had known Mr. Taylor; became acquainted with him at Hodge's, Carlton House, Broadway, in 1856 or 1857, and that his acquaintance had continued with intervals up to the time of his death; that his last association with him was as attorney of the Brunswick and Albany Railroad, of which Mr. Taylor was one of the directors and stockholders; that he was also a director and stockholder part of the time. Am familiar with the handwriting of Mr. Taylor, and have often seen him write; have seen him write a good many times his signatures; don't know that he ever noticed his general handwriting, any thing but his signature; he indorsed a great many notes in his presence that he carried to him, at his request; saw it done, sat by him when he did it. On being shown the will, and being asked whether it was or not Mr. Taylor's signature, he replied that, from what he knew of his signature, he would believe it to be his; should have no doubt of it if it was presented to him attached to a note to discount, and if he had had the money to discount it would lend the money on it; that was his faith in it.

CHARLES W. BAKER, who resides at No. 178 Madison avenue, testified that he had known Mr. James B. Taylor for thirty years, having made his acquaintance at the Carlton House, and that since that time his acquaintance had been of the most intimate character; was formerly a member of the firm of McSpedon & Baker, paper dealers; during the last four or five years had been frequently in the habit of seeing Mr. Taylor two or three times a week; saw him at his office and house; the relations between their families were intimate; had a great many business transactions with Mr. Taylor during the last few years of his life; during the time of the absence of his family in Europe he was in the habit of seeing him frequently; breakfasted and dined at his house a number or times during the summer of 1870; during the months of July and August was in the habit of seeing him at least two or three times a week; breakfasted with him the Monday previous to his death; during the last few years of his life had been in the habit of seeing him write his name; think I could tell his signature; am familiar with his handwriting. On being shown the signature to the will, he stated that in his opinion it was in the handwriting of Mr. Taylor; had no doubt of it. On cross-examination, he testified that he had frequently received checks from him during the ten years preceding his

death; estimated that he had received at least a thousand during the ten years; the checks were signed "James B. Taylor."

GEORGE H. DURYEE testified that he was the Night Superintendent of the Post Office, having charge of the entire office from six in the evening until five in the morning, and had held the position since September, 1869; that he received the appointment through James B. Taylor; had been acquainted with Mr. Taylor for fourteen years; it commenced in 1856, when he went in his employ as a clerk; that it continued until 1861, when he went to the war and remained until spring of 1862, when he was honorably discharged, at the request of Mr. Taylor; then returned to New York and re-entered the employment of Mr. Taylor; had been in the habit of seeing Mr. Taylor write; became familiar with his handwriting more than any man living; his relations with Mr. Taylor were confidential. On being shown the will, he testified that the signature was in the handwriting of Mr. Taylor, and he had no doubt of it. On being cross-examined, he said he had sat at his desk alongside of him when he had been writing and practising his signature; filling whole pages of paper with nothing but his signature; that was a habit he had on account of the unsteadiness of his hand. On cross-examination, he testified he saw whole pages of Mr. Taylor's handwriting every two or three weeks for the last five or six years; while Mr. Taylor was sitting at his desk, writing in that way, he was talking to him; first remember his doing it about five years ago; might have been or might not have been more often than once a month during the last three years, of his making pages of his signatures that way; he had rheumatism in his fingers and rheumatism in his shoulders; sometimes the rheumatism bothered him, and sometimes it did not; the last time he saw him do this was last summer; it might have been in July; don't think he did it in August, because he was not feeling very well then; during August he had a cold and was feeling bilious; he made those signatures on whatever scraps of paper were lying around; would cover both sides of the paper; they were afterwards torn up, burned up, destroyed in some way or other by Mr. Taylor; his hand was never steady from the time I have known him.

FRANCIS B. SPINOLA, a resident of this city, and for many years a member of the State Senate, testified that he had been acquainted with Mr. Taylor for twenty-five or thirty years; he first made his acquaintance when Mr. Taylor resided in the Seventh Ward, and that his relations of intimacy, which had been as intimate as any two men could be during the last years, continued to his death; had business associations with him during the last year; for a number of years they had operated together in various things; had business transactions pending with him at the time of his death; saw him alive on the day he left his office, on Wednesday previous to his death; had seen him write frequently, innumerable times; was familiar with his handwriting and signature. On being shown the will, and asked to state whether the signature was in the handwriting of Mr. Taylor, he replied that he had no doubt of it in his mind.

This is a summary of all the testimony of the witnesses, on both sides, who speak from personal knowledge of the handwriting and signature of the decedent, being thirteen in number for the contestant and the same number for proponents; but I notice particularly that all the former expressed opinions which were founded, more or less, on a previous examination of what purported to be photographs of the signature to the will, and of other assumed signatures of the decedent, and so photographed in different sizes.

It is therefore important to consider the use of these purported photographic reproductions of the signatures of Mr. Taylor, though excluded so far as they were offered to assist the expert, Southworth, in his examination; as they were used as a means of comparison by all of the witnesses but one on the part of the contestant, who testified from personal

knowledge of the handwriting and signature of the decedent that the signature to the propounded will was not, in their opinion, genuine.

From the accurate study of them it must be evident from the testimony that two of the witnesses, Mr. Marsh and Mr. Van Vechten, changed their opinion as to the genuineness of the signature to the will. It is also evident from the testimony that from the study or examination of these photographs, as presented to them by the counsel for the contestant, the data were furnished from which their opinions were prepared. The lines and loops, the strokes and angles that they dwelt upon, were observed, measured, magnified, and noted in the photographic copies submitted to them by the counsel for the contestant.

The same objections which may be urged against the admission of these photographs in evidence, holds good against the value of the opinions and deductions formed from their study. Too many collateral issues are involved to render them reliable testimony. Those who are familiar with the details of photography, are aware of the many circumstances that would have to be made subjects of affirmative proof, and will readily appreciate this statement.

The refractive power of the lens, the angle at which the original to be copied was inclined to the sensitive plate, the accuracy of the focusing, and the skill of the operator, and the method of procedure, would have to be investigated to insure the evidence as certain. The court would be obliged to suspend its examination as to the question of the genuineness of the signature, *which is before it*, and which is the primary subject of evidence, to listen to conflicting testimony of the proponent and contestant as to who exhibits the most skill and perfectness in their photographic reproductions, and in fact to inquire into the whole science of photography.

When we reflect that by placing the original to be copied, obliquely to the sensitive plate, the portion nearest to the plate may be distorted by being enlarged, and that the portion farthest from the plate must be correspondingly decreased, while the slightest bulging of the paper upon which the signature is printed may make a part blurred, and not sharply defined, we can form some idea of the fallacies to which this subject is liable.

Moreover, I cannot see, even if there be no possibility of variations in the photographic reproduction from the original, what material assistance photography can be in this case. It is not claimed that the signature is traced over another signature, but that it differs. If it differs from the signatures which are exhibits in the case, it speaks for itself. It is not claimed that any man always writes exactly the same, but on the contrary the experts admit that a man varies in his signature in minute points, though the characteristics are always the same.

If the characteristics are the same, they should be apparent to the ordinary observation;—otherwise they can hardly be called practical characteristics. I cannot, therefore, see why photography should have been brought in this case. Its tendency is rather to mislead than to help the witnesses who take these photographs as an assistance; for the reason that they start on the major premiss, which is a fallacy, that the photograph of the signature which is alleged to be a forgery must correspond in its minute details with the signatures admitted to be genuine. Upon this premiss they build up the differences and deduce the conclusion that the disputed signature does not correspond with the other signatures;—while a moment's reflection, showing them that no two signatures of the same person are likely to exactly correspond, would convince them of the absurdity of the use of these photographs; or as being merely means (provided they are correct) of magnifying the little differences which they could see, primarily, by examining the signatures themselves.

This sort of examination, though it may be useful, provided it be honestly and skilfully applied, to determine the genuineness of a bank-note, is of no avail

when applied to handwriting. A forgery cannot be discovered by the same means as a counterfeit. In the latter case, where all the lines and impressions are produced by machinery always acting in the same way, exercising the same amount of pressure on each occasion, and producing results which are mathematically alike, we have no comparison with the peculiar and in many respects unique process of handwriting.

In the former case, we may resort to magnifying glasses and measuring scales with some hope of achieving satisfactory results; in the latter case we can only appeal to personal knowledge of the individual's handwriting, and even that is dependent upon his physical and mental condition at the time, and the circumstances of the occasion.

Nor is it claimed, as I have stated, that the signature, which is disputed, is a signature traced over another, so as to agree mathematically, but on the contrary it is claimed that it varies from the other signature.

The signature to the will is the primary subject of evidence. It is the only proper evidence from which to judge. Men are governed in their opinion of handwriting by the handwriting itself.

In what manner can photography make the signature, in any practical sense, more appreciable to the observer than the signature itself?

The operator may, moreover, through fraud or skill, make some particular lines in the reproduced signature stand forth more prominently than in the original signature.

If the photograph be an absolutely perfect reproduction of the original signature—the former being the same as the latter—there can be no necessity for the study of the reproduction.

If, through the fraud or skill of the operator, some lines be brought out with undue prominence, then it should not be considered proper evidence on which to base an opinion, for it is not a correct reproduction. If, through the choice of the operator, he reproduces it on paper of such shade as to bring forth prominently certain lines, it certainly is not a proper basis for the ordinary witness to form an opinion, who judges from a personal knowledge of the handwriting of the decedent, written, as all the exhibits show, on ordinary paper. But it is claimed that by photography we can magnify and bring out prominently the minute differences. But no man forms his opinion of another's handwriting from those characters which it is necessary to use a glass to make apparent. It does not appear that Mr. Marsh or Mr. Van Vechten, or any of contestant's witnesses, had Mr. Taylor's signatures on notes, letters, and documents with which they were thoroughly acquainted, either photographed or magnified.

They were acquainted with his natural signature.

Besides, is it not probable that any man, whose signature is subjected to the process of photography, having such different reproductions presented to him, would be unsettled in his own belief as to its genuineness, if he had not been present at the experiments practised on it?

If photographs are properly excluded, for the reasons which I have given, as unnecessary, when the signature claimed to be a forgery is itself in evidence, then the opinions drawn from the study of those, must be weakened. In the case of Mr. Van Vechten and Mr. Marsh, after their examination of the will in the Surrogate's office, they pronounced the signature to be that of Mr. Taylor; but when they were presented by the counsel for the contestant with the photographs, and had their attention called to various points, they changed their opinion, and pronounced it not to be like Mr. Taylor's signature.

It being, however, clear that the opinions even of witnesses having personal knowledge of the handwriting of the decedent from having seen him write, and testifying adversely to the genuineness of the signature, and especially if they do not, in number and degree of knowledge, largely preponderate over opinions supporting the genuineness, —should weigh but little against the evidence of the subscribing witnesses who

stand otherwise unimpeached as to their credibility,—how much less weight is to be given to the evidence against genuineness when founded upon photographic data, liable and subject to all the imperfections and criticisms I have expressed in regard to such testimony.

But to bring this branch of the discussion of the case to a close, I find that, if, attaching the fullest value to the evidence of contestant's thirteen witnesses, who speak from personal knowledge of decedent's handwriting, even with the assistance of the photographic and magnified productions of his signature,—their opinions as to its non-genuineness are contradicted and fully equally balanced by the testimony of the same number of proponent's witnesses, having equal personal knowledge of the handwriting and signature of Mr. Taylor, and having social and business relations with him of as long standing, and as respectable in character as those on the part of contestant,—who testify that, in their opinion, the signature of the propounded will was written by the decedent. Therefore, the evidence of mere opinions of genuineness, leaves me to determine that question upon the testimony of the subscribing witnesses,—except as the same may be affected by the other evidence in the case.

There is one circumstance in the body of the will which appears to me to be of importance. At the end of the will, and in the attestation clause, the figures "30th" are inserted, which was the date of the alleged execution of the will.

The testimony of some of the witnesses on the part of the proponents, is that it is in the handwriting of Mr. Taylor, though this portion seems not to have been noticed on the part of the witnesses for the contestant. It is certainly very apparent that it is not in the handwriting of the body of the will, and the appearance is that it was written by the same hand that made the signature, and at the same time. That is, there is a difference in the handwriting in the body of the will, and the figures "30th," as they appear twice. If it be true that Mr. Taylor made the signature, then the inference is that he filled up the dates at the time of the execution.

Having thus presented the testimony of the two subscribing witnesses, Witherell and Jackson, and also of Mr. James M. Sweeny, the special administrator appointed by this court, in regard to the discovery of the instrument, and likewise of the witnesses personally acquainted with the handwriting of the decedent, and my view of the value of experts not so acquainted with his handwriting, and also as to the influence of photographs to bias their opinions. I now approach the question,—in what respect and how far the testimony of the subscribing witnesses is sustained or contradicted or weakened, by other evidence before me; and in discussing the same, the primary question is,—how far their statements are supported, in respect of their presence at the office of Mr. Taylor, at 48 Pine street on the 30th day of June, 1870, the date of the instrument.

Mr. Benjamin Field testified that he resides at Albion, in this State; that he had been acquainted with Mr. Taylor for sixteen years—since 1855; that he had business transactions with him during the last summer, at his office, No. 48 Pine street; that not a long time before his death he had a negotiation with him that required him to meet him several times; he does not remember the last time he met him, but once or twice within a month of his death. He remembers that on the last day of June—the 30th of June—he met him at his office; he fixed the date that he came from Washington on the morning of the 29th, and returned there on the evening of the 1st of July, and that it was the second day after his arrival that he met Mr. Taylor.

He went to his office on the 29th day—on the day of his arrival, but Mr. Taylor had left his office, and he returned there the next morning; he must have gone there about eleven o'clock, and he waited some time, he did not remember how long, before Mr. Taylor arrived—perhaps an hour. He had an interview with him in the private office—back room; the interview was about a business in

which Mr. Taylor proposed to advance him some money; he saw in the office that day Mr. Robert Murray, Mr. Jackson, and Mr. Witherell; there were some other persons, though he did not remember who they were. In reply to a question as to what occurred between him and Mr. Taylor in reference to Mr. Witherell and Mr. Jackson he testified as follows: While I was in the office with Mr. Taylor—in the back office—private office—some person came to the door and spoke to Mr. Taylor, and whether there was one or more I don't remember, came to the door, and Mr. Taylor then said to me, "Will you be so kind as to step into the other room? I desire to see these gentlemen privately." I immediately left the room, and while leaving I met these two gentlemen, Mr. Jackson and Witherell, whether inside of the private room or outside of the door I don't remember, but before I got to my seat in the outer office.

He further testified: they went in the private office; couldn't state with any definiteness how long they were there; don't remember whether the door was closed or not; they were there certainly ten minutes, and not over forty; they left the office before he (witness) left the outer office; before he left the outer office they left the building; he didn't remember whether they came in the reception room and stopped before going out.

In reply to a question as to what occurred between him and Mr. Taylor subsequent to the time when these gentlemen left the private office, he testified as follows:

"I think nothing was said by Mr. Taylor after that in regard to Mr. Jackson, but he did speak of Witherell. Mr. Murray had made some bantering remarks in regard to Witherell and Taylor; as he came out of the room, the door then being open, so that he could hear in the back room, he said to me, 'Field, don't believe any thing that Bob is saying to you; don't believe this damned nonsense that Bob is saying to you.' And then Mr. Taylor sat down by me and went into a long conversation, detailing his first acquaintance with Mr. Witherell, which was when he first arrived in the city; I think he said some forty years ago, thirty or forty years ago, and he told me of the interest he had taken in the Witherells—in the family, in the mother and sister of Witherell, I think; that he had got Mr. Witherell a place, first with Mr. Murray, when Mr. Murray was Marshal, and had since got a place for him under Mr. Jones, the Postmaster, I think, as superintendent of a station; that was the substance of the conversation, though the conversation was a long one. He went on to say that he had taken a deep interest in Witherell, and then he detailed to me the circumstance of the family going west—the Witherell family going west some years ago; that they were unsuccessful there and came back. I think he told me that he sent them some money to get back, and gave them money after their return for them to get on with, and he told me something of the circumstance of his getting this appointment—the present appointment of Mr. Witherell—from the Postmaster, and told how much pains it had cost him to do it, how much trouble it had taken to to do it.

Mr. Field testified moreover that he determined the fact that he was at Mr. Taylor's office on the 30th day of June by referring to the arrival and departure book at the Fifth Avenue Hotel, where he was stopping.

On cross-examination he stated that he could not recollect the others who were there beyond those he had named; has no recollection whether Gen. Spinola was there or not, though afterwards, on the name of Gen. Boynton who recently came from Ohio being mentioned to him, he recollected that that gentleman was there; that he arrived in the city from six to seven o'clock on the morning of the 29th; called at Mr. Taylor's on that day two or three o'clock in the afternoon when the office was closed; called on the 30th, about eleven o'clock.

Sherman B. Chaffee testified that he was clerk at the Fifth Avenue Hotel, and had charge of the register and rooms;

on referring to the books he testified that Mr. Field arrived on the morning of the 29th of June, and left on the evening of the first of July.

Mr. ROBERT MURRAY testified that he recollects meeting Mr. Field and Mr. Witherell at the office of Mr. Taylor in the summer of 1870, though he could not call to mind the fact that Mr. Jackson was there; he had no way of fixing the time, except from the statement of Mr. Field to me in reference to a joke he played upon Mr. Field that day. As to which he testified as follows: "I came in—I think I met Mr. Witherell on the stairs or in the hallway, and stopped and shook hands with him, and I asked him how he was, and when he went in I found Mr. Taylor telling a story to Mr. Field which perhaps I had heard five hundred times before from Mr. Taylor about Witherell. Mr. Taylor said, 'There, Bob, he will tell you all about him. He was with him close on eight years.' Says I, 'Ben, don't you take any notice of Jim; he is very intimate with an old-maid sister of Mr. Witherell.' Jim turned around and said I was a 'damned fool,' or something of that sort or to that effect; that was all I recollect about it; the remark was altogether jocose; the lady is about seventy years old; think Gen. Spinola and Gen. Boynton were also there; we met Witherell in the upper or lower hall, going out.

FRANCIS B. SPINOLA testified that he knew Edward Witherell; had known him twelve or fifteen years; had met him in the Marshal's office when he used to frequent it, during Mr. Murray's administration here; had known Mr. Jackson a year; first saw him in Mr. Taylor's office about a year since; Mr. Taylor's relations with Mr. Witherell were very intimate; had met him at Mr. Taylor's residence a well as at his office, and his relations with Mr. Jackson during the time he saw them together were as social and intimate as any two ordinary gentlemen. On the 30th day of June, 1870, I saw at Mr. Taylor's office Mr. Witherell, Mr. Jackson, and Mr. Field; am under the impression, though not positive, that General Boynton was also present; he is from Ohio, and connected with the revenue department; had an appointment that morning at Mr. Taylor's office with Mr. Jackson, an appointment that had been made a week previous. Mr. Field came in a few moments after he arrived and took a seat in the back room; Mr. Taylor was there then; we were by the back room; the private office; Mr. Jackson and myself stood out there in conversation concerning the purpose of our meeting, and remained there until Mr. Taylor came in; think it was about 12 o'clock, the middle of the day; he walked in the private room and remained there a short time, and Mr. Witherell came in; Mr. Witherell stepped up to the door and spoke to Mr. Taylor, and in a very short time Mr. Field came out to the outer office, and Mr. Taylor called Jackson; he was conversing with him, and he stepped into the private office with Mr. Witherell and Mr. Taylor; they remained standing, Mr. Taylor, Mr. Jackson, and Mr. Witherell in the private office; the door was open, unless he closed it for some specific purpose; he walked across to the corner of the room and took a glass of water; to get the water he had to pass the door leading from the outer to the inner office; the three were in conversation in the inner room—in the private room; he came back and sat down on the chair he had left, and from there he could look directly into the room; Mr. Taylor sat down to the table and signed a paper of some kind; Mr. Witherell and Mr. Jackson did the same thing; in a very short time they returned to the outer office, Mr. Witherell and Mr. Jackson. Mr. Spinola also testified, as he commenced to turn on the water, heard the word "witness," though he had no idea what they were doing.

Mr. Spinola also corroborates the story of the conversation about Mr. Witherell's sister; is under the impression that he saw Mr. Wells at the office on that day, because he had private business with Mr. Wells in connection with Mr. Taylor, which brought him there almost daily at that time.

Mr. HENRY S. WELLS testified that he

had seen Mr. Witherell at Mr. Taylor's office a half dozen times, and had also met Mr. Jackson several times at Mr. Taylor's office; he recollects having seen Mr. Jackson and Mr. Witherell at Mr. Taylor's office, and several other gentlemen, at one time, but he could not fix the exact date.

Now, as to the presence of other persons than the subscribing witnesses on the occasion, viz., the 30th day of June, 1870, I deem it conclusively established that Mr. Fields visited the office on that day. The precise day hardly admits of a doubt, especially with the evidence of Mr. Chaffee, clerk of the Fifth Avenue Hotel, who had charge of the register of that house. And Mr. Field testifies positively that on that day he saw there Taylor, Witherell, and Jackson. He testifies also positively as to what occurred at that time as to private business between Mr. Taylor and the subscribing witnesses, and which is easily reconcilable with the character of the business which they state he had with them—a business private in its character, and on account of which Mr. Taylor said to Mr. Field, "Will you be so kind as to step into the other room? I desire to see these gentlemen privately."

Mr. Field testifies that he also saw there on that occasion Mr. Robert Murray, though he don't remember whether Gen. Spinola was there. He also states that General Boynton, of Ohio, was there.

And thus the testimony of Mr. Field is consistent with the evidence of Mr. Witherell as to the presence of other persons than Mr. Jackson. Mr. Witherell stated on his cross-examination that he did not take much notice who were in the outer room, though he saw Jackson, Spinola, and a big stout man—a man he saw there frequently (a description agreeing with Mr. Field, who testifies that he visited the office often), and there might have been one or two others. And Field thus corroborates the testimony of Jackson, who says "there were several there," but he does not remember who they were, other than Spinola.

Next, it appears from the testimony of Mr. Murray that on the day in the summer of 1870 which was recalled to him by the statement of Mr. Field in regard to a jocose remark in relation to Witherell's sister, in which conversation Mr. Taylor joined, to which Mr. Field's testimony likewise refers, that he met as he was coming in Mr. Witherell on the stairs or in the hallway, and when he went in he found Mr. Taylor telling a story about Witherell to Mr. Field, which is the same story Mr. Field recites. He thinks Gen. Spinola and Gen. Boynton were there also, though he could not call to mind that Mr. Jackson was there at that time.

It is important to consider in this connection, that at the time Murray came in, Mr. Taylor and Witherell and Jackson had separated, for Mr. Murray met Mr. Witherell in the hall as he was going down stairs.

Gen. Spinola's testimony also corroborates the fact that Witherell, Jackson, Taylor, Field, and Murray were in the office on the day in question, and thinks Gen. Boynton was there also.

Having thus presented, I think substantially, all the evidence bearing on the question who were present at the office of Mr. Taylor on the day of the alleged execution of the propounded paper, as corroborative of the testimony of the subscribing witnesses, I must decide that there has been no evidence presented by the contestant at variance with it in any respect. Neither is the credibility of either of the witnesses Field, Murray, and Spinola in any manner questioned or impeached, either by their cross-examination or by any evidence whatever in the case.

Upon the proofs already adverted to,—if not otherwise overcome,—I should be compelled to regard the admissibility of the instrument in question to probate, as fully established; and it only remains, now, for me to consider the value, force, and effect of the evidence of the contestant, offered as shewing or tending to shew that the instrument is wholly inconsistent with the affection, acts, and declarations of the decedent towards, or in respect of, his granddaughter; and if so wholly inconsistent

I am asked to decide that the paper is not genuine, and that the subscribing witnesses have committed wilful and corrupt perjury, besides being accessory to the crime of forgery.

It is obvious that evidence of that character must be overwhelming, in order to impeach the genuineness of an instrument, supported by such positive testimony as I have before me.

A somewhat wider range of inquiry was allowed to the contestant in her proofs, in these respects, than now appears to have been necessary; but, at the time, I did not feel justified in confining counsel to such narrow or rigorous limitations, as might exclude testimony bearing on the possibility of the execution of a will in 1867, like the unexecuted paper prepared by Mr. Marsh, and found in the desk of the decedent (and by Mr. Marsh identified as the very paper that came from his office with the date of July 12, 1867, inserted, ready for execution),—and which might thus prove an executed, and not merely contemplated, testamentary purpose, more favorable in its terms to the contestant than the instrument now in question; but the evidence presents no ground for believing that a will, like the paper drawn by Mr. Marsh in 1867, was ever executed, and, not having been done, it is to be regarded as only expressing a purpose and disposition he then entertained, but afterwards held in suspense, and, I must hold to have been, finally abandoned; and it is, therefore, now to be considered like any other declarations of the decedent, made three years before the date of the propounded instrument, and indicating more liberal views of the disposition of his property towards his granddaughter; though as of little controlling weight, in the scale of evidence, compared with acts and declarations three years later, after the event of his granddaughter's marriage, and under the other circumstances proved in this case.

Nothwithstanding a very considerable degree of latitude was allowed to the *contestant* in her proofs of the decedent's declarations of intention to make a different disposition of his property in case of his death,—but, it appears, never executed by will,—embracing declarations as long ago as 1867, and offered in connection with the paper so drawn by Mr. Marsh, as tending to show that one like it had been consummated—I yet limited the *proponents* in their offers of declarations of the decedent, as to his making or having made a will (in rebuttal of the allegation of forgery of the propounded paper), to declarations made by the decedent, *after* the date of the paper now in question, that he had made a will, with any statements by him of any of its provisions corresponding with, so as to identify, the paper as the one referred to; not to be taken, however, as direct proof, but only as corroborative testimony of the *factum*.

Taking the evidence, altogether, on the part of the contestant, to show declarations of decedent that he had in fact executed a will like that prepared by Mr. Marsh, it is so slight and unsatisfactory, that it seems hardly necessary to comment upon it in detail. That he did not wholly abandon the thought of it, until after the child's marriage, may be true; as Mr. Van Vechten testifies that very shortly after the marriage, the decedent inquired his opinion whether that involved the necessity of a change in his will, the inquiry having reference to whether any property would vest in the husband under it, and he was told by him, not; and one other witness, Mr. Cooper, testifies to some conversation with Mr. Taylor soon after the marriage, in which he expressed his intention not to alter his will, although he had, at a prior interview with him, just after the marriage, said he should alter it so that the young man (the husband) would not get any of his money; but Mr. Cooper also said that at neither of the several interviews with Mr. Taylor, in which he referred to a will, did he say *distinctly* that he had executed one. I deem it clear that, in speaking, before the marriage, of any will, as made to any of the witnesses who have testified on that point (doubtless with the impression from what he said that one had been actually signed), the decedent referred only to

the *unexecuted* paper prepared by Mr. Marsh, and found in the drawer of the office desk (and which Mr. Marsh shows was the very paper left with Mr. Taylor to be executed); especially as none of the witnesses for the contestent speak of any declarations of the kind made *after* a week or very short period subsequent to the marriage; and if I needed any other support of my conclusion on that subject it is, that Mr. Marsh, who acted as his private counsel in the preparation of the paper, and whose name was inserted as an executor by the express directions of the decedent, testifies that his relations as counsel, and his friendly and intimate relations with him, continued down to the period of his death; that he went to decedent's office on Wednesday to see him on some important law business, and found that he was quite unwell, and advised him to go home, and declined going on with the business before him, and that he died on the Monday after, and *he saw him every day until he died.* Now, as Mr. Marsh is silent as to any reference by Mr. Taylor on those occasions, to the existence of the will he prepared, as an *executed* paper; I am left to infer that Mr. Taylor said nothing to him about it; which was certainly remarkable under the circumstances, if the instrument *had been* executed and were still in force; but not perhaps singular if another will, not drawn by Mr. Marsh, had been in fact signed, omitting all the charities mentioned in the *unexecuted* paper, (consisting of those named by Mr. Marsh, under the authority of Mr. Taylor to insert any he deemed worthy of bequest, in case both Mrs. Taylor and Kate died without issue).

On the other hand, the case furnishes the following testimony of declarations of the decedent made *after* the date of the propounded instrument (June 30, 1870), and corroborative of the fact of the existence and execution of such a paper; in my judgment a class of evidence not only admissible, but of great importance upon the question of *genuineness* of the *factum*, when such declarations are proven by intimate and confidential friends who are clear and positive in their statements and conversations, and especially when it appears that they were made under such circumstances as to show that the declarations were earnest and sincere, and could hardly have been misunderstood.

JOHN L. PIPER testified that he was an examiner in the Damage Bureau of the United States Appraiser's Department in this city; that he had been there since March last; that he had been bookkeeper in the Union Place Hotel for five years and a half, and that Mr. Taylor resided at that hotel from June, 1864, to the spring of 1869; that his relations to Mr. Taylor had been friendly and intimate, and had been so since he left the hotel up to the time of Mr. Taylor's death; that since he left the hotel he would see Mr. Taylor every week or two, or three weeks; that he was in the habit of going to Mr. Taylor's office, and that he had been to his house frequently. In reply to the question, whether he recollected the last conversation he had with Mr. Taylor, he stated that it was in August preceding, and that the one next preceding that was in July; that the conversation was at Mr. Taylor's office. In reply to the question, "Did you have any conversation with Mr. Taylor in July in reference to his making a will, or having made a will; and, if so, state what that conversation was?" he testified as follows: A. This was in July, 1870, in Mr. Taylor's office. We had been in conversation on different topics, when he complained of not feeling well and expressed an intention of going to Canada; he thought that the rest and change would benefit him; I advised him to give up business entirely, telling him that he had more money than he wanted, and more than his only heir could spend. He then asked me if he had not told me that he had made his will; I told him no, that he had told me two or three times that he intended to, and how he was going to make it; he then said, "Yes, and I give Katy $5,000 a year." I think he said that he made some presents, and the rest went to his wife; I asked him if he thought he gave Katy enough; he said, "Well, yes; if the young man was

good for any thing, it was enough; and if he was not good for any thing, it was enough for him to spend." During the same conversation, he said that if he was worthy he would give him more; and if he wished to go into business, and showed any inclination to do business, he would help him. And he did not vary from that statement on his cross-examination.

CHARLES W. BAKER testified that he was acquainted with Mr. Taylor for thirty years; that during the months of July and August he was in the habit of seeing Mr. Taylor at least two or three times a week, and that he dined and breakfasted with him frequently; that he breakfasted with him on the morning of of Monday preceding his death, at which time he had a conversation with him. In reply to the question, "State what the conversation was, how it arose, and state the circumstances," he testified as follows: "Immediately after the breakfast, we adjourned to his sitting-room, and I inquired when he had heard from his family, and he told me recently, and where they were; they were then in Paris; and in the course of the conversation he told me that had made a will, and that he had left the bulk of his property to his wife, who had helped him make it, and who, he believed, was the best custodian of it, and he didn't care a damn what became of it after his death. . . . On the Monday previous to his death, when we had this conversation in which he said he had left the bulk of his fortune to his wife, who had helped him make it, and who he thought was the best custodian of it, he stated he had left Kate five thousand dollars a year."

MARIA DONNELLY testified that she had resided in the family of Mrs. Taylor since the 23d of February, 1869, in the capacity of housekeeper; that she was in the family at the time Kate ran away and got married; that she had taken quite an interest in trying to reconcile Mr. Taylor and Kate, after the marriage; that she had informed Mr. Taylor of the fact that Kate had called at the house after her marriage. The following is an extract from her testimony:

Q. I will call your attention to the early part of July. Do you recollect Mr. Taylor's receiving a letter from any one of them, and any thing he said—who the letter was from, and any thing he said in connection with it?

A. He received one from Katy.

Q. How soon after their arrival abroad, do you think?

A. I think the letter came from a place called Coblentz, and he threw the letter down after he had read to a certain paragraph in it, and said—I suppose I must say just what he said—he said she wrote that Mrs. Taylor and she could n't travel together, and that she supposed it would be very unpleasant for them to be separated, and that Mrs. Howland and her own son had done every thing towards making Mrs. Taylor comfortable and happy. Mr. Taylor, when he read as far as there, threw the letter down, and he swore.

Q. Tell what he said?

A. He said, "D—n Mrs. Howland and her sensitive son."

Q. Did he say any thing else in reference to the old lady, or Kate and her husband, at that time?

A. He said that before they got much further advanced in their affairs he would show them that Mrs. Taylor was not going to be abused or ill-treated by them, and that they should not come to the house.

Q. Did he say any thing in reference to a man having been in his office that day speaking with him?

A. Well, the conversation—I made the remark and said I supposed they were coming there to the house when they came back from Europe. Mr. Taylor said that he had made up his mind that Mrs. Howland had planned the whole thing of Katy's going away—that she had planned the whole affair of Katy's going away—running away; and I made the remark back, and said that Mrs. Howland would be kind to Katy because she had no daughter, and he says, "You need not make any remarks to me about it. I have had a man in my office to-day that told me that for twelve years she went to Richfield Springs to spend

her summers, and on this occasion she went to New Bedford to plan taking his child from him."

Q. Did he say any thing in that conversation with reference to his taking care of Kate?

A. I said I thought it would be pleasant for Katy to come to the house, as their house had been shut up, and no one was taking care of it, and her not being well, that I hoped he would let her come. He said, "Well, he wouldn't have them all there; that if Katy had a mind to come herself, she could come," says he, "for I shall always take care of Katy, but the Howlands shall never possess a dollar of my money."

Q. Did he say any thing in reference to a will in this conversation?

Q. (By the SURROGATE)—Was this after the 30th of June?

A. Yes; it was all after the 5th of July.

Q. What did he say?

A. He said the day that he went away to Canada for the horses.

Q. About what day was that—do you remember?

A. I think it was the 14th of July; I won't be sure, 14th or 15th.

Q. What day was it he said this about the will?

A. On the 14th of July, at breakfast, or 15th, I won't be sure; I said to him I had a letter from Katy, and I took the letter, and was going to hand it to him to read, so that he would read it before he went up stairs; said he, "Never mind now, I am coming home early, I am going away this afternoon;" and as he turned round he says, "Where are they now?" I said I believed they were in Paris; I looked at the post-mark on it, and he turned around and says, "Well, I am going to settle my affairs, so that the Howlands will never have a dollar of my money."

Q. Did he say any thing in reference to their abuse of Mrs. Taylor abroad? What did he say, if any thing, on the subject?

A. On several occasions he mentioned—I didn't know for what reason, I didn't bring up the conversation—that the Howlands were treating Mrs. Taylor very shabbily.

FRANCIS B. SPINOLA, in reply to the question, "Had you any conversation with Mr. Taylor subsequent to the 30th day of June, 1870, in reference to his making a will or the disposition of his property?" testifies as follows:

A. In the early part of July.

Q. Where?

A. We had been to Hoboken together; it was on our way home from Hoboken.

Q. State whereabouts you were, and under what circumstances?

A. We had been to Hoboken on some business in which we were connected, and after attending to what we had to do there, we walked to the upper part of the village; and on our return on board the boat I asked Mr. Taylor whether he had done what he had been speaking to me about at our last visit to Jersey City, in regard to his will. He told me he had, and that he had made it. I asked him what he had done for Kate, whether he had carried out his previous intentions. He said he had; that he had given her five thousand dollars a year; the balance he had given to the "Queen," was his own language.

Q. Was the term "Queen" the term that he generally used when he spoke of his wife?

A. Yes; he addressed her by that term thousands of times in my presence; spoke of her as the queen; called her by that appellation.

Q. Did he say any thing else about the Howlands on that occasion?

A. Yes, sir; he spoke a number of times about the Howlands to me.

Q. Subsequent to the 30th of June?

A. He did on that very day.

His further conversation as to the Howlands the evidence will show.

Doctor HENRY F. QUACKENBOSS, physician to Mr. Taylor, testified that "about a year previous to Mr. Taylor's death he discovered that he was afflicted with Bright's disease of the kidneys; that Mr. Taylor resided then at the Union Place Hotel, room 110; that he did not make known to him at that time that he had any dangerous disease fastening upon

him: and gives as a reason for not telling him that Mr. Taylor was a very peculiar man about sickness. but he hinted to him that he must be very prudent about his manner of life. Mr. Taylor called upon him at his house about once in four weeks during the months of June and July of the year 1870. The witness testifies as follows:

Q. I will call your attention to any conversation that you had with Mr. Taylor in the months of July or August at your office; if you recollect what he said about his health, when you told him about his health, state what he said about his condition?

A. The last time Mr. Taylor was in my house was in the month of July, when he put his hand up in this way [to his heart] and said, 'Here is my trouble.' I think it was the early part of July, it was the warm weather.

Q. What else, if any thing, did he say in reference to his family affairs on that occasion?

A. I answered him, 'If every organ in your body was as sound as your heart you would live to be an old man.' He said, 'You don't understand me;' he said, 'There is grief here [patting his heart], and that is killing me.'

Q. Did he indicate to you what that grief was?

A. He said that his granddaughter, the only thing that was left him, had run away, and married against his consent, and to the last person in the world that he would like to call son in-law.

Q. What did you say to him in reply?

A. I told him it was too late to grieve about that, if she were really married and off in Europe, and the best thing to do was to give the young folks a chance and it might turn out all well in the end.

Q. Did he say any thing further on that subject at that time?

A. He did.

Q. Do you recollect what it was? If so, state it.

A. I do, sir, distinctly. After I told him to put a good face to the matter and the thing might turn out for the best in the end, he said that young Howland—do you want the very words?

Q. Yes, as near as you can give it.

A. He said young Howland was a ——— rascal, and only married the girl for her money."

In reply to a question asking what conversation he had with Mr. Taylor in reference to the condition of his business at time, he says:

A. "I told Mr. Taylor on Thursday his head was then clear, his mind was all all bright, that life was very uncertain, that he was in a condition of sickness which, at his time of life, didn't promise to turn out favorably, and I said to him, 'Have you all your business arrangements settled?' He said, 'Yes.' I then said to him, as we medical men generally say to our sick patients, that are dangerously so, 'Mr. Taylor, you have a large property, you have got a wife, and got a granddaughter, and I know you have several friends, have you made your will? it is a document that every one ought to have made.' He said, 'My will is made,' and his affairs were all in a condition that he could leave."

Q. Was this after you had told him he was a dangerously ill man?

A. This was the Thursday that I told him that he had typhoid fever; it was the thing he died of; it came on very suddenly, and I told him, as he had been a little delirious, that his head was perfectly clear, if he hadn't his will made to send for Mr. Luther R. Marsh, who I always knew had been his lawyer. 'Your head is clear now, you send for Mr. Marsh, and make your will.' He said, 'My will has been' or 'is made.'"

SAMUEL G. COURTNEY, formerly United States District Attorney in this district, testified that he had been acquainted with Mr. Taylor fifteen years. In reply to the question, "Do you recollect having any conversation with Mr. Taylor, either in the month of July or August, 1870, in reference to Kate and the Howlands; and if so, state what it was, and where it occurred?"

"A. In July, the latter part of July, or about the first of August last, 1870, I was going down from my house—I lived in Thirty-fourth street—down Broadway, and as I came to the corner of Twenty-

third street and Broadway, or Fifth avenue, rather, I met Mr. Taylor; it was, I think, eight or half-past eight o'clock in the evening; a very warm evening, I know; he was standing on the corner on the stoop of the drug-store.

"Q. Twenty-fourth street?

"A. Twenty-fourth street; Caswell & Mack's drug-store, at Twenty-fourth street, under the Fifth avenue Hotel; as I came along, he spoke to me; I walked up on the stoop, and stood there with him, and conversed some time; he told me he had been away, and had got home.

"Q. Did he tell you where he had been?

"A. He did not, that I recollect of; he had been out of town, as I understood; he had been away from his house; he didn't tell me where he had been, I didn't ask him; I asked him how he was getting along with Kate; I knew of this difficulty; I had talked with him about it before; I forget now exactly what reply he made to that; I asked him what kind of a man Mr. Howland was, who had married her; who he was; what Howland he was. He become quite indignant, bristled up, as I call it; 'Well, he says, 'he is a man that stole away Kate, you can imagine what kind of a man would do that.' I told him I had hoped he had got reconciled about the matter, as some time had elapsed since it occurred, and that Kate would not be injured by it in his estimation; that is the way I talked to him, tried to cool him down a little, as I was very friendly to Kate, and always had been, and wanted to have the trouble rectified if I could. He said that this man—that is the word he used—would never get a dollar of his money. I then remarked that I hoped Kate wouldn't be injured by it. He said, no; that he had provided for her. That is about the substance of what occurred. I talked a little more with him and left. Then I didn't see him after that."

William L. Shardlow testified that he had known Mr. Taylor from twenty to thirty years, probably thirty-five years, and that he had known the wife and granddaughter about fifteen years. He testified that he had a conversation with Mr. Taylor between the 1st and 15th of July in Mr. Taylor's private office, and added:

"A. I cannot recollect the conversation particularly, only the main points of it; it was very little; that he had given Kate $5,000, and that the d——d Howlands should not have any of his money. I think that that was the exact expression that Mr. Taylor made use of.

Q. Go on and state all he said on the subject?

A. That was pretty much all that was said on the question; that is all that I think that he said on the subject; that he had fixed the Howlands, or something to that purport; that they should have none of his money, or words to that effect.

Q. Where was Mr. Taylor's family, his wife and granddaughter, at that time?

A. They were in Europe.

Q. Did you hear him say any thing about them in this conversation?

A. I think I heard him say at that time that Mr. Howland had abused Mrs. Taylor very much, or something like that; I think I heard him say it at that time."

Even making due allowance for the mistakes and misapprehensions to which all witnesses are liable in testifying to conversations, after a considerable lapse of time,—so much depends upon the precise words used, and a recollection of *all* that was said,—still, looking at the general effect and bearing of the evidence above quoted, of declarations of decedent since his granddaughter's marriage, there is no reasonable doubt that, in those declarations and statements, the decedent referred to the will now propounded for probate. And, there being no proofs of declarations by the decedent of contrary or conflicting testamentary acts, or intentions, during the period of fourteen months next before his death, it is strong confirmatory evidence that the decedent had changed the purposes and dispositions, which contestant's witnesses testified he had, previous to her marriage, expressed to them concerning his property.

Now, what is there in this case to show, or tending to show, that the provisions of the propounded instrument are so inconsistent, (as has been claimed), with natural affection or with the devoted attachment proven to have existed between the decedent and his granddaughter, as to render it improbable that he could have executed such an instrument, or if he did execute it, that it must have been with undue influence or fraud upon him by some person or persons?

That there were always the most affectionate relations between the decedent and his granddaughter, to the time of his death, is placed beyond question by the evidence before me; and I do not except from this statement even the displeasure which, it is established by the testimony, he felt, when his granddaughter, secretly, left his house, without his own or his wife's consent or knowledge, in company with young Mr. Howland, to go to a distant place, for the purpose of an immediate private marriage; when even the betrothal between them had not yet received his sanction, as the evidence compels me to believe; and after Mrs. Taylor had expressed her disapproval of the marriage, although it appears, from the testimony of the contestant, that she had previously encouraged and approved of the engagement.

But even that displeasure was proof of the most sensitive pride and affection for her, both of which were deeply wounded; and the young bride herself, of her own volition, hastened back to the city in a few days, from New Bedford,—not to stay, for she remained but a day,—and with what conscientious motives, and impelled by what feelings, she, while here, sought her "Father,"—and the state of his affection toward her,—on her apparent penitence when they met,—sufficiently appears from the testimony:—that when he went into the room, his first words were, "Kate, how could you leave me?" She testified that he came down very much affected, and she was also; she began to cry, and she felt very badly, and he took her in his arms and begged her not to cry, or she would make herself sick, and that he kissed her and she sat upon his lap by the window:—and Mrs. Donnelly, the housekeeper, who, it seems, had, of her own accord, asked Kate to call, testifies that on that occasion, Kate went up to her father and embraced him, and he took her in his arms and she had something like hysterics; but that she heard her say, '*Father, don't say any thing to me!*" and yet, it further appears from the evidence of Mrs. Donnelly, whose statements on the subject I have no reason to doubt as being accurate in substance, that when she told him Kate was in the house, he seemed very much excited, and said he could not see her, and he went into another room, and wound up a musical instrument and set it going, then again into his room, and came out again and said he would not see her, and she asked him to please go down and see her, that she, Kate, wanted to see him very much, if it was only to tell her that he would not forgive her; that he was very much excited, and he said no, he would not go down, that he did not know what she came for, that she had caused him a great deal of trouble, and she asked him again to go, and he did go into the back room on the first floor, and she was there alone, and Mr. Taylor said, when he first went into the room, "*Kate, how could you do this?*" Mrs. Donnelly having overheard and seen what she affirms, by being in the parlor connecting with that room.

Here I deem it important to observe that it appears that, on that occasion, young Mr. Howland went into the basement, before Kate saw her father, and remained there during the call; and, neither Kate nor Mrs. Donnelly having testified that, on that occasion, any reference was made by, or in conversation with, Mr. Taylor, to the husband, I conclude that Mr. Taylor did not see the young man, and was not aware that he was in the house, or that if he knew he was there, he was unwilling to see him; and that, consequently, there were no proven signs of reconciliation, then, towards *him;* an important distinction, bearing upon another branch of the case.

There is some other evidence

shewing that the decedent, very shortly after the marriage, exhibited to his friends a violent disturbance of his temper, and that he even said, in effect, that his granddaughter *would gain or make nothing by it;* but as the witnesses who spoke of that, were quite uncertain of the precise date,—in view of other controlling and positive evidence, it is my belief that, especially after the first call made on Mr. Taylor, subsequent to the marriage, he could have used no ill-tempered expressions in respect of herself, though I must hold that the evidence fails to establish that, notwithstanding he forgave Kate in his heart, he could not forget the unhappiness and mortification the circumstances of the marriage caused him at the time; still, it is a significant fact, that, as Kate testifies, her father never spoke to her about her marriage, or referred to it, from the time of her first interview with him after the event,—in considering whether he ever became unreservedly reconciled to the marriage, and the manner of its occurrence, notwithstanding his forgiveness to his daughter; but the testimony, taken altogether, shows, to my mind, that, at the time of the marriage, he was angered towards her husband, and that he was suspicious that some responsibility for the marriage, or the manner of it, rested upon some of the family of the young husband; that his mind was never wholly divested of that impression, and yet, the marriage being irrevocable, he and his wife, also, resolved to "*make the best of it*," which is the expression used by some of the witnesses.

He made inquiries about the family of Mr. Howland, and witnesses testify that he declared himself satisfied with what he heard of them. He learned that the young man had just entered into business. He does not appear to have made any charges or insinuations, at the time, against his habits or reputation; but he was very young, barely of age, and Kate, herself, was but eighteen;—his character, (in his judgment) probably not yet sufficiently matured to assure him of his daughter's happiness or welfare; his love for her, rendering him extremely jealous of any risk in those respects; and yet, for her sake, disposed to discover, in his connections of family and business, encouragement to believe that the marriage might yet prove a happy and prosperous one for his daughter.

Thus, it came about that the two families of the young couple met; but there had already been a long and significant interval of time after the marriage, with no acquaintance between Mr. or Mrs. Taylor, and the mother, or any member of the family of the young man. The marriage took place on the 14th of July, 1869. Mrs. Taylor and the elder Mrs. Howland were in the country a portion of the summer, but Mrs. Howland and her family returned to town to stay, about the 15th of September; the young couple considerably sooner; and Mrs. Taylor returned to stay, about the 9th of October; and about the middle of November Mrs. Taylor made the first call on Mrs. Howland senior, (with whom Kate and her husband were residing), and introduced herself to Mrs. Howland,—to invite all the family to a Thanksgiving dinner at her house the week following; which invitation was accepted. That was the *first acquaintance* of Mrs. Taylor and Mrs. Howland, Sen., and at the dinner, was the first acquaintance between Mr. Taylor and Mrs. Howland, although their residences were not far apart, and considerably over a month had elapsed, after all parties returned for the season, and four months after the marriage, and neither family had formed the acquaintance of the other,—though the marriage occurred at New Bedford, in the elder Mrs. Howland's presence; and it does not appear that, since the marriage, until the dinner referred to, Mr. or Mrs. Taylor and young Mr. Howland had met.

These facts shew conclusively to my mind, that this long delay, in the mutual acquaintance of the families, was owing to the difficulty the Taylor family experienced in becoming so far reconciled to the marriage, as to make the overtures, they did, for a dinner, on a day which was deemed an occasion less embarrassing than others to the parties, not to betray the reason of the previous de-

lay in conventional courtesies; but although the proof is that Mr. Taylor was exceedingly kind, cordial, and polite,—it could not be reasonably supposed it would be otherwise,—yet we have no evidence from Mrs. Howland the elder, or younger, or any one present, that there were then any congratulations, upon the alliance between the two families.

It appears that a fortnight afterwards, Mrs. Howland, Sen., reciprocated the compliment by a dinner to the same party at her house, at which not the slighest unpleasant feeling was exhibited by any one, Mrs. Howland testifying that, on that occasion, the decedent expressed a wish to see Henry's business papers (but which were not then shewn him); and that at a shortly subsequent time at his own house, when she desired him to advise her about a paper concerning her own affairs, he told her he was pleased the young man was in business, and that if he did not make a dollar he wanted him to learn to take care of money, that every young man should have some business to attend to; and that he then spoke of him kindly, and seemed to take an interest in him; but I fail to discover in the testimony any evidence of a marked liking for him personally, or any interest in him, beyond what was natural, in his anxiety to know what assurances there were of his granddaughter's welfare in the marriage she had contracted, and yet careful to say and do nothing that could, either to herself or her husband, appear unkind or discouraging; but, on the contrary, expressing satisfaction in finding that he had entered upon a business career, if it resulted only, from the first experiment, in learning the value and care of money.

About this time, the health of Mrs. Taylor was such as to contemplate a voyage to Europe on that account, and it was partially arranged that she should go, accompanied by the elder Mrs. Howland, and, in that case, Kate and her husband were to remain with the decedent at his house during the absence of the others; but the plan was deferred,—when Kate was taken quite ill in March, and for her health, as well as for her mother's, it was decided that the two, and Kate's husband and his mother, should visit Europe, as they did; sailing on the 14th of May, and returning, as already stated, in August; but to the time of their departure, Mr. and Mrs. Taylor, and Mrs. Howland, Sen., only occasionally interchanged visits, and there is no evidence of any intimacy or attachment between them, or of much intercourse between others than Kate and her father and mother; and it does not appear that, after the party named left for Europe, the nearer acquaintance between Mrs. Taylor and the elder Mrs. Howland or her son, ripened into a feeling of affection, or even of intimacy or warm friendship; though I have failed to discover, from the testimony, that, during that absence, any thing occurred to prove any real change in the affection of Mrs. Taylor and her daughter for each other; despite the instances of unpleasantness, more fully detailed by Mrs. Howland, Sen., than by the daughter, and despite even the separation of the party at Cologne, for a few weeks travelling apart; Mrs. Taylor with her maid and the others together; rejoining, however, a few weeks after at Paris, whence they soon left for the return steamer at Havre, and came home, as they went;—nothing happening to mar their cordial relations after they came together at Paris.

But, aside from the general evidence above given, tending to shew that the decedent in his mind attached some responsibility to the elder Howland, for assisting at the marriage of the daughter under such circumstances, (when, particularly, as she testifies, she supposed that the decedent did not know that the marriage was to take place, or the couple would not have left New York as they did),—it is material to consider the following testimony of his continued displeasure expressed *after* the date of the instrument in question, viz.:

He, Mr. Taylor, had given Kate $5,000 a year, and the Howlands should not have any of his money. (Mr. Shardlow.)

He, Mr. T., should always take care of Katy, but the Howlands should never possess a dollar of his money. (Mrs. Donnelly.)

He, Mr. Taylor, had fixed the Howlands so that they would not inherit a dollar of his money. (Mrs. Donnelly.)

He, Mr. T., had given Kate $5,000 a year. On being asked if that was enough for her, he said it was as much as —— —— (referring to young Mr. Howland) should ever have of his money. (Mr. Spinola.)

Dr. Quackenboss testified that in the early part of July last Mr. Taylor said, "Here is my trouble; there is a grief here," patting his heart, "and that is killing me;" that his granddaughter, the only thing that was left him, had ran away and married against his consent, and to the last person in the world he would like to call son-in-law. He only married the girl for her money. The Dr. also said that the Thursday before his death Mr. Taylor said all his business arrangements were settled; that his will was made, and his affairs all in a condition to leave. Dr. Quackenboss further testified that on Monday preceding his death, Mr. Taylor said he had made a will, and had left the bulk of his property to his wife, and who, he believed, was the best custodian of it; that he had left Kate $5,000 a year (Mr. Baker).

Samuel G. Courtney testified that in July or August last he asked Mr. Taylor what kind of a man young Howland was, when Mr. T. became quite indignant, bristled up, and said "Well, he is the man that stole away Kate; you can imagine what kind of a man would do that;" that he would never get a dollar of his money, and on being told by witness that he hoped Kate would not be injured by it, he answered no, that he had provided for her.

Now, before making any further application of the evidence to the instrument in question, it is well to observe that there is no dispute made of the mental capacity of the decedent at the time of the alleged execution, nor is it claimed that, if the subscription is his genuine signature, there is any defect in the attestation or in the other formalities required by the statute; and, if genuine, and made without any undue influence or fraud upon the decedent, it is wholly immaterial how unjust or inequitable the instrument is, as a whole or in any of its parts. Every person capable of making a will has a *legal right* wholly to deprive his child, children, or other descendants, of any share of his estate upon his decease; even with the *motive* of *disinheritance*, with or without cause; and how common it is, for a husband to devise all to the wife, and a wife to her husband, and that, without being considered any impeachment or reflection upon their affection for their children; and often, in such cases, what may appear to be unjust to them, especially if minors, (incapable of sufficiently appreciating the value of property), may, and probably is, generally, best for them, —having a due regard for their future.

In many such instances, it is also pre-eminently just and proper, that the surviving parent should have the sole estate, and the survivor be left to dispose of it by will, as circumstances and the matured characters of children should render wise and expedient. At all events, whether just or not, expedient or not, the law does not question it, and allows the individual freely to judge.

But, in this case, the decedent has not, by the instrument offered, given his entire estate to his wife. Besides the legacy of $10,000 to his confidential clerk, and a legacy of $2,500 and the use for life of a dwelling-house to one Adeline Weston, he secures $5,000 a year to his granddaughter, the contestant, for life (which is the interest of about $75,000 capital); and it is maintained that the provision for her benefit is so small that the instrument cannot be genuine, or if genuine, that such undue influence or fraud must have been practised upon the decedent by Mrs. Taylor, the principal devisee and legatee, Mr. Duryea, another legatee, or, if not by either of them, by some other person or persons unknown. I discover no evidence, whatever, needing comment, in regard to the allegation of fraud by any person in procuring the execution of the instrument, although it is one of the written allegations; and as to undue influence, the counsel for contestant has offered no tes-

timony that I consider requires discussion, except such as must be supposed by him to have been the letters written by Mr. Taylor to the decedent, while in Europe. Without referring to the degree of importance I might attach to such proofs if offered, it is sufficient to say that there are no such letters in evidence before me. Yet the counsel for contestant offered very considerable evidence to shew that, while last in Europe,—and, since her marriage, before she went abroad—there were occurrences exhibiting provocation and displeasure on the part of her mother toward her, sufficient to warrant the belief that she had exerted her influence upon the decedent, to that extent, as finally to lead him to make the instrument in question, if it be genuine. Otherwise, such testimony has no materiality whatever, unless offered to shew that Mrs. Taylor was so disaffected toward her daughter as, possibly, to be implicated in the fabrication of the instrument; but the counsel of the contestant, in his final argument, expressly disclaimed any such imputation, and he was understood finally, on the trial, to abandon every allegation filed in the case, except non-genuineness. Still, as so much evidence was already before the court as to the occurrences, which had been offered as tending to shew undue influence, to the prejudice of the daughter, that I have felt called upon to examine the testimony in that respect; and I see nothing in any of the instances to which the elder Mrs. Howland or the daughter referred in their testimony, which may not be reconciled with a deep and ineradicable affection between mother and child. It is impossible for any court to become fully possessed of all the circumstances or influences, causing or attending such incidents as were detailed, as happening in privacy,—or to determine their earnestness. The evidence was at best meagre, and I regard the occurrences as shewing only momentary ebullitions of feeling, to which all are more or less liable, and which are yet consistent with enduring affection.

Indeed, almost every unpleasantness in Europe or here, referred to as between mother and daughter, is proven to have been soon followed by some kind or pleasant act or word; and even, on this trial, neither Mrs. Taylor nor the contestant, was subjected to any cross-examination by the other; the testimony of Mrs. Taylor was very brief, and only as to two or three matters; and the contestant herself exhibited a remarkable candor and caution, and, in her statements about disagreements, was much less minute than her mother-in-law.

Therefore, had not the contestant's counsel withdrawn his claim of undue influence, I should hold that there was no proof whatever to sustain the allegation.

Next, what is the evidence of *probabilities* upon which reliance is placed by contestant's counsel, to show that this paper does not contain the real will and disposition of the decedent, and is therefore not genuine?

First. That it is at variance with his great affection for his granddaughter.

The will appears to me not at all inconsistent with that affection, (albeit it was a bar against benefit to the Howlands); for in giving her $5,000 a year for life, it secured her against privation, and assured her the means of defence against her husband's possible neglect or inability properly to provide for her, (which the decedent may have feared;) but at the same time left the daughter to rely upon the good judgment, affection, and generosity by will, of her grandmother, (as she had trusted her grandfather;) the decedent thus leaving much to depend on the future character and conduct of the young husband, who had only just entered upon business life, and concerning whose career it appears Mr. Taylor entertained some apprehensions.

Another consideration which may, very well, have influenced him as to the provision for the daughter, (of whom no child had then or has yet been born), was to guard against the husband succeeding to her personal estate, in case of her death without issue. It appears that she had been seriously ill in March, before she went to Europe the last time, and her visit there was on

account of her health, and she is now of a fragile frame and constitution.

Second. It is urged by the contestant that the place where the will was found is so at variance with the decedent's careful and methodical habits as to render it improbable that he put it there, and that, therefore, it is not genuine.

It must be admitted to be a singular fact that the will was found in that place; but, still, it is a matter of experience that even careful and methodical men sometimes take pains to put things of value, or which they wish to keep secret, in places where the curious would be the least likely to look for them; but I find proof before me that, after his death, some promissory notes and other valuable papers were found loose in the drawer of his desk, although there was his iron safe at hand where most methodical men would have put such papers.

In this connection the testimony of Edward H. Tracy and Dr. Quackenboss are important. On the Saturday before the death Mr. Taylor told Mr. Tracy, as he testifies, he had some fine books in his office, and some he, Mr. Tracy, ought to have; and he asked Mr. Tracy if he had "Benton's Thirty Years in the Senate," and told him he wanted him to have them. At this point the conversation was interrupted by a call, and Mr. Tracy left, saying he would talk about it when he was better, but did not see him afterwards alive. *The will offered for probate was found in that book, and Mr. Tracy is named, in it, as one of the executors.*

Dr. Quackenboss also testifies to hearing some conversation between Mr. Taylor and Mr. Tracy about the latter having some books he wanted him to have. And the Doctor also says the decedent, on Friday before his death, said there was a paper at his office he must get, and nobody knew where it was but himself, and he was determined, sick as he was, to go to his office; which paper may be very reasonably believed to have been this will.

Third. Some importance is attached by contestant to the non-production by proponents of the draftsman or scrivener of the will. There is no evidence who drew or copied the paper, or tending to show it; except that, when the will was discovered, Mr. Duryea, the clerk of the decedent, said he thought it looked like the writing of one Owen, a lawyer, who had sometimes done business for the decedent. I am satisfied that a reasonable effort was made by proponents to learn in whose writing the body of the paper is, and who drew it, but they did not succeed; and that they also used proper diligence, by subpœna and attachment, to compel the attendance of the Mr. Owen referred to, though without success. I notice there is a mistake in spelling a word "requisit", in the paper, which leads me to believe that the writing is that of a *scrivener*, but the general construction of it must have been taken from some precedent, or drawn by a lawyer and then copied.

Fourth. The counsel for contestant made some endeavor to show that the body of the will is in Mr. Duryea's handwriting, and upon the theory that the writing of the body and of the signature is the same, to cast the suspicion that he forged the will. There is, however, no proof upon which to base any such conclusion of fact.

Some of the witnesses for contestant assume to trace *similarities* in the body of the paper to that of Mr. Duryea, while other witnesses for proponents, who are acquainted with his writing, deny that there is any resemblance. No distinct allegation was, on the trial, made against him of having forged the paper, and the record shows that the counsel declined then to make the charge. I dismiss the theory as entirely unsustained by evidence. To establish it, there must have been a conspiracy with the subscribing witnesses, if not others also, to commit the crime of forgery, and if forgery was committed, perjury has been superadded; but any charge of forgery is expressly denied by the testimony of Mr. Duryea, and the examination of the subscribing witnesses was very searching; and it is impossible for me to deduce from the evidence of the three, or either of them, that it is a forgery, or that there is ground of

suspicion that it is so. Besides, Mr. Duryea testifies that he has no knowledge, and cannot now form an opinion in whose handwriting the body of the will is; and if this will is to be rejected on the ground of non-genuineness, I should have to be satisfied that the testimony is wholly inconsistent with the innocence of those three witnesses; whereas such is not the case, and the evidence of the subscribing witnesses is strongly and abundantly corroborated by the other testimony for the proponents, and no part of the testimony points, in that respect, to either of the other legatees.

The contestant endeavored to attack the credibility of Mr. Witherell by shewing some declarations he made at Mr. Taylor's house the day after the death, in conversation with the elder Mrs. Howland and a sister of Mr. Witherell, in which Mrs. Howland made particular inquiry whether the decedent left a will; neither Mrs. Taylor, nor the younger Mrs. Howland, nor her husband being present. The elder Mrs. Howland testifies that, in effect, Mr. Witherell answered that he had heard of no will, while the latter substantially denies Mrs. Howland's statements, and gives as a reason for his evasive answers to inquiries she made of him on the subject, on the day after the death, that secrecy was enjoined upon him by Mr. Taylor, and he intended to keep his promise of secrecy until the will was found. He said he did not know what he would have told Mrs. Taylor if she had asked him if he knew of a will. but neither she nor young Mrs. Howland made any inquiries of him about it.

I have now, I believe, reviewed this case in all its important aspects, and have endeavored to give due weight to all portions of the testimony, as bearing on either of the grounds of contest presented in the written allegations filed,—and have discussed some of them, which were, in effect, abandoned or disclaimed by contestant's counsel on the trial. In arriving at my conclusion, I have confined myself to the evidence,—irrespective of, and uninfluenced by, many questions to witnesses, from which inferences might be drawn, as facts, reflecting on some of the parties to the controversy, or other individuals, but of which there was no proof, whatever, in the case.

The result of my careful examination of the testimony, and consideration of the arguments of the respective counsel, is as follows: I find;

1. That the paper propounded for probate is the last will and testament of the decedent.

2. That it was signed by him on the 30th day of June, 1870, and witnessed, and in all respects, executed, according to the requirements of the statute.

3. That the decedent was, at that time, of sound and disposing mind, memory, and understanding; and

4. That the decedent so executed the same, as his free act; and that no fraud, deceit, undue influence, coercion, or circumvention, was practised upon him by any person or persons whomsoever, in respect of the provisions, making or execution of said will.

It is, therefore, my decree that the said instrument be admitted to probate as a will of real and personal estate.